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Title: Federal Savings and Loan Insurance Corporation, as Receiver for Manning Savings and Loan Association, Petitioner
v.
Harold J. Ticktin, et al.

Court: United States Court of Appeals for the Seventh Circuit

Counsel for petitioner: Solicitor General

Counsel for respondent: Beem,Marc O., Cohen,Gerald, Ticktin,Joseph J.

Entry	Date	Note	Proceedings and Orders
1	Mar 3 1988		Application for extension of time to file petition and order granting same until May 12, 1988 (Stevens, March 7, 1988).
2	May 12 1988	G	Petition for writ of certiorari filed.
3	Jun 21 1988		DISTRIBUTED. September 26, 1988
5	Jul 23 1988	F	Response requested -- JPS.
4	Aug 2 1988		Waiver of right of respondent Raymond Powers to respond filed.
6	Aug 20 1988	X	Brief of respondents Harold J. Ticktin, et al. in opposition filed.
7	Sep 7 1988		Letter from SG filed and distributed.
8	Sep 23 1988		Letter from the Solicitor General received and distributed.
9	Oct 3 1988		Petition GRANTED.
			**********
10	Nov 10 1988		Record filed.
		*	Certified copy of C. A. Proceedings received.
11	Nov 17 1988		Brief of petitioner FSLIC filed.
12	Nov 17 1988		Joint appendix filed.
14	Dec 16 1988		Brief of respondents filed.
15	Jan 4 1989		CIRCULATED.
16	Jan 4 1989		CIRCULATED.
17	Jan 6 1989		SET FOR ARGUMENT MONDAY, FEBRUARY 27, 1989. (1ST CASE.)
18	Feb 11 1989		Record filed.
		*	Certified copy of original record, 2 volumes, received.
19	Feb 27 1989		ARGUED.

PETITION FOR WRIT OF CERTIORARI

87 1865 (1)

No.

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In the Supreme Court of the United States

OCTOBER TERM, 1987

FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, AS RECEIVER FOR MANNING SAVINGS AND LOAN ASSOCIATION, PETITIONER

v.

HAROLD J. TICKTIN, JOSEPH J. TICKTIN, WILLIAM HEATON, HAROLD BROWN, AND JUDITH TICKTIN

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTION PRESENTED

The Federal Savings and Loan Insurance Corporation (FSLIC), having been appointed by the Federal Home Loan Bank Board as receiver of a FSLIC-insured state-chartered institution, brought this suit in that capacity against former directors and shareholders of the institution to recover damages for the issuance and receipt of two dividends in violation of state and federal law. The question presented is whether the federal district court had jurisdiction over this suit under 12 U.S.C. 1730(k)(1) and 28 U.S.C. 1345.

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In the Supreme Court of the United States

OCTOBER TERM, 1987

No.

FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, AS RECEIVER FOR MANNING SAVINGS AND LOAN ASSOCIATION, PETITIONER

v.

HAROLD J. TICKTIN, JOSEPH J. TICKTIN, WILLIAM HEATON, HAROLD BROWN, AND JUDITH TICKTIN

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Solicitor General, on behalf of the Federal Savings and Loan Insurance Corporation (FSLIC), petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-18a) is reported at 832 F.2d 1438. The opinion of the district court (App., *infra*, 19a-37a) is unreported.

JURISDICTION

The judgment of the court of appeals (App., *infra*, 38a-39a) was entered on November 2, 1987. An order denying the petition for rehearing and suggestion for rehearing en banc (App., *infra*, 40a-41a) was entered on

December 14, 1987. On March 7, 1988, Justice Stevens extended the time in which to file this petition to and including May 12, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES AND REGULATIONS INVOLVED

Pertinent federal statutes and regulations are set out in the appendix to this petition (App., *infra*, 42a-71a).

STATEMENT

1. Prior to February 1983, Manning Savings and Loan Association (Manning) was a savings and loan association chartered by the State of Illinois and insured by the FSLIC. In that month, the Federal Home Loan Bank Board (Bank Board) appointed the FSLIC to be the receiver of Manning, pursuant to 12 U.S.C. 1729(c)(1)(B).[1] The FSLIC subsequently brought this suit against respondents, all of whom were directors of Manning, and three others. Two of the respondents (Harold and Joseph Ticktin) were shareholders as well as directors; the remaining respondents were non-shareholder directors; two defendants who are not respondents in this Court were shareholders but not directors.

According to the complaint, in 1980, Manning's directors declared a dividend to all "permanent reserve" shareholders (chiefly, certain directors themselves). The Illinois Commissioner of Savings and Loan Associations determined that the dividend violated Illinois law because Manning had insufficient net worth and reserves when it was paid. The directors did not recoup any portion of the dividend, and the FSLIC in late 1981 issued a Notice of Charges and Hearing alleging that Manning had violated federal net worth requirements, 12 U.S.C. 1726(b); 12 C.F.R. 563.13. The FSLIC simultaneously issued a cease-and-desist order temporarily prohibiting the payment of dividends. The United States District Court for the Northern District of Illinois modified the order to prohibit only the payment of dividends in violation of state law. In April 1982, the FSLIC amended the Notice of Charges and Hearing to advise Manning and its directors that Manning had a negative net worth of more than $500,000, was more than $2 million below the net worth required to maintain FSLIC insurance, and had monthly operating losses of approximately $300,000. Nevertheless, in May 1982, the directors authorized the distribution of a dividend to permanent reserve shareholders. App., *infra*, 20a-21a.

The complaint alleged that the 1980 and 1982 dividends were illegal under federal law because both were prohibited by FSLIC's net worth and reserve requirements, 12 C.F.R. 563.13, and the latter violated the cease-and-desist order. The complaint also alleged that respondents Harold and Joseph Ticktin and other directors violated federal conflict-of-interest regulations, 12 C.F.R. 571.7(b), in issuing the dividends.[2] The complaint further alleged that issuance of the dividends violated certain Illinois statutes, Ill. Ann. Stat. ch. 17, paras. 3093, 3110, 3111 (Smith-

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[1] The Bank Board, in addition to its other duties, is the operating head of the FSLIC, which is responsible, under 12 U.S.C. (& Supp. IV) 1724 *et seq.*, for insuring the accounts of all federally chartered savings and loan associations and most state-chartered savings and loan associations. Under 12 U.S.C. 1729(c)(1)(B), the Board has the power in certain circumstances involving insolvency, dissipation of assets, or unsafe or unsound conditions (12 U.S.C. (& Supp. IV) 1464(d)(6)(A)(i), (ii), and (iii)) to appoint the FSLIC receiver of a state-chartered FSLIC-insured institution.

[2] The complaint alleged as well that the directors violated a FSLIC regulation, 12 C.F.R. 563.33, by allowing more than two members of the same immediate family to be directors. App., *infra*, 20a, 31a.

Hurd 1981), which prohibited issuance of dividends unless provision had been made for all reserves required by the FSLIC. The complaint sought money damages from the defendants in their capacity as directors for breach of their fiduciary duties; it also sought recovery from those defendants who are also shareholders for unjust enrichment, at the expense of creditors, as a result of their receipt of the illegal dividends. App., *infra*, 20a-22a.

2. The district court's jurisdiction over the FSLIC's claims as receiver for Manning[3] was based in part on 12 U.S.C. 1730(k)(1), which was enacted as part of the Financial Institutions Supervisory Act of 1966, Pub. L. No. 89-695, § 102(a), 80 Stat. 1042. That section states:

> Notwithstanding any other provision of law, (A) the Corporation [FSLIC] shall be deemed to be an agency of the United States within the meaning of section 451 of title 28; (B) any civil action, suit, or proceeding to which the Corporation shall be a party shall be deemed to arise under the laws of the United States, and the United States district courts shall have original jurisdiction thereof, without regard to the amount in controversy; and (C) the Corporation may, without bond or security, remove any such action, suit, or proceeding from a State court to the United States district court for the district and division embracing the place where the same is pending by following any procedure for removal now or hereafter in effect: *Provided*, That any action, suit, or proceeding to which the Corporation is a party in its capacity as conservator, receiver, or other legal custodian of an insured State-chartered institution and

[3] A claim brought by the FSLIC in its corporate capacity was dismissed by the district court (App., *infra*, 24a), was not pursued on appeal, and is not at issue in this Court.

> which involves only the rights or obligations of investors, creditors, stockholders, and such institution under State law shall not be deemed to arise under the laws of the United States. • • •

Unless limited by the proviso just set forth, Clause (B) of this section grants jurisdiction over this suit, since the FSLIC is a party. Moreover, Clause (A) indirectly establishes jurisdiction under 28 U.S.C. 1345, which grants the federal courts jurisdiction over any suit brought by "any agency • • • expressly authorized to sue by Act of Congress," [4] since Clause (A) states that FSLIC is an agency for purposes of 28 U.S.C. 451, and under 12 U.S.C. 1725(c)(4), FSLIC has "power • • • [t]o sue and be sued." See also 12 U.S.C. 1729(b) and (c)(1)(B)(i)(II) (powers of FSLIC as receiver); 12 U.S.C. 1729(d) (power to collect obligations to institution).

Respondents, however, moved to dismiss, arguing that this suit fell within the jurisdiction-limiting proviso of Section 1730(k)(1). The district court denied the motion. The court concluded first (App., *infra*, 24a) that the case does involve only the rights of Manning and its investors, creditors, and stockholders, stating that the fact "[t]hat some defendants here are directors as well as stockholders does not persuade the court the action should be removed from the proviso's coverage" (*ibid.*). The court held, however, that the proviso was not applicable because the case did not "involve" only rights and obligations "under State law." This requirement of the proviso, the court observed (*id.* at 24a-25a), was not satisfied merely because all claims

[4] 28 U.S.C. 1345 states: "Except as otherwise provided by Act of Congress, the district courts shall have original jurisdiction of all civil actions, suits or proceedings commenced by the United States, or by any agency or officer thereof expressly authorized to sue by Act of Congress."

"arise under" state law; rather, the court said, since the case "requires the interpretation of federal law, it falls outside of the proviso's scope" (*id.* at 25a). Here, the court held, the state-law claims for breach of duty were based on and would require resolution of federal-law questions—notably, whether the dividends violated the FSLIC regulations establishing net-worth and reserve requirements.[5] Concluding that the proviso of Section 1730(k)(1) therefore does not apply to this case, the district court held that it had jurisdiction.[6] The court then certified this ruling for appeal.

3. The United States Court of Appeals for the Seventh Circuit reversed, holding that the proviso of Section 1730(k)(1) bars federal-court jurisdiction in this case (App., *infra,* 1a-18a).[7] The FSLIC contended that the

[5] The district court also observed that the accounting principles used to determine whether dividends could lawfully have been paid "are to be determined under accounting principles in part recognized by the [Bank Board] for a federal association" (App., *infra,* 26a). The FSLIC pointed out, in addition, that whether respondents violated the cease-and-desist order was a federal question involved in the case (*id.* at 25a).

[6] The district court focused only on the state-law claims for relief in resolving this issue, because it concluded (App., *infra,* 31a-37a) that the federal laws and orders allegedly violated did not themselves give the FSLIC as receiver a cause of action for damages. The court also ruled that, although the Illinois statute relied on by the FSLIC did not provide a cause of action to the FSLIC as receiver here (App., *infra,* 28a-29a), Illinois common law did furnish a cause of action against both the directors and the shareholders (*id.* at 29a-31a). The FSLIC does not contest any of those rulings.

[7] The court first rejected prior Seventh Circuit statements (see *Katin* v. *Apollo Savings,* 460 F.2d 422 (1971), cert. denied, 406 U.S. 918 (1972); *FSLIC* v. *Krueger,* 435 F.2d 633, 636 (1970)) that Clause (B) and the proviso apply only to removals from state court proceedings and not to actions commenced in federal court. The court held that Clause (B) is a grant of original jurisdiction limited by the proviso. App., *infra,* 5a-9a. That ruling is not challenged.

district court had jurisdiction under Clause (A) and 28 U.S.C. 1345, and that the proviso does not limit that jurisdiction because the proviso declares only that certain cases do not arise under federal law and Section 1345 confers jurisdiction over suits commenced by an "agency" regardless of whether they arise under federal law. The FSLIC also contended that the district court had jurisdiction in any event under Clause (B). The court of appeals ruled that the proviso barred jurisdiction under either clause.

The court stated (App., *infra,* 11a-12a) that Clause (A) was inserted solely to make clear that the FSLIC is an agency for purposes of Section 1345 (a point that had then recently been in dispute, see *Acron Investments, Inc.* v. *FSLIC,* 363 F.2d 236 (9th Cir.), cert. denied, 385 U.S. 970 (1966)), and was not intended, despite its language, to add a basis of jurisdiction not limited by the proviso. The court further reasoned (App., *infra,* 10a-12a) that Congress could not have intended to confer jurisdiction under Clause (A) and Section 1345 whenever the FSLIC is a plaintiff, but to confer jurisdiction only within the limits stated in the proviso when the FSLIC is a defendant, since Clause (B) grants jurisdiction whenever the FSLIC is a party, defendant or plaintiff, and does not suggest an intention to distinguish the two situations. The proviso, the court concluded, states an absolute limit on federal-court jurisdiction, either under Clause (B) or under Clause (A) and 28 U.S.C. 1345.[8]

[8] The court of appeals relied on *FDIC* v. *Sumner Financial Corp.,* 602 F.2d 670 (5th Cir. 1979), which held that the Federal Deposit Insurance Corporation (FDIC), as receiver of a state bank, could not assert Section 1345 jurisdiction in a case that came within the proviso of 12 U.S.C. 1819 Fourth, the counterpart for the FDIC of the FSLIC's Section 1730(k)(1). Section 1819 Fourth states, in relevant part:

> All suits of a civil nature at common law or in equity to which the Corporation shall be a party shall be deemed to arise under the laws of the United States, and the United States district courts

The court of appeals next held that the proviso applied to this case. First, the court rejected the FSLIC's contention that, because the suit involves claims against Manning's former *directors,* it does not involve "only the rights or obligations of investors, creditors, stockholders, and [the failed] institution" (Section 1730(k)(1)). The court concluded (App., *infra,* 13a-15a) that the proviso applies whenever the only "rights" in the case are those of the failed institution, regardless of who the defendants are.

Second, the court rejected the FSLIC's contention that the case does not involve "only * * * rights or obligations * * * under State law" (Section 1730(k)(1)) because the complaint alleged, in support of the state-law causes of action, that respondents violated federal law—the FSLIC's

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shall have original jurisdiction thereof, without regard to the amount in controversy; and the Corporation may, without bond or security, remove any such action, suit, or proceeding from a State court to the United States district court for the district or division embracing the place where the same is pending by following any procedure for removal now or hereafter in effect, except that any such suit to which the Corporation is a party in its capacity as receiver of a State bank and which involves only the rights or obligations of depositors, creditors, stockholders, and such State bank under State law shall not be deemed to arise under the laws of the United States. * * *

The *Sumner* court observed that Section 1730(k)(1) might require a different result from Section 1819 Fourth, pointing out that when Congress enacted Section 1730(k)(1) in 1966, it took note of the fact that Clause (A) has no counterpart in Section 1819 Fourth. 602 F.2d at 680, citing S. Rep. 1482, 89th Cong., 2d Sess. 19 (1966), and *Financial Institutions Supervisory Act of 1966: Hearings on S. 3158 Before a Subcomm. of the Senate Comm. on Banking and Currency*, 89th Cong., 2d Sess. 319M (1966) (section-by-section analysis of bill submitted by the FSLIC, FDIC, Federal Reserve Board, and Comptroller of the Currency). Apparently unpersuaded by this basis of distinction, the court of appeals in the present case extended to Section 1730(k)(1) the *Sumner* holding regarding Section 1819 Fourth.

net worth and reserve regulations, federal criminal statutes (18 U.S.C. 657, 1006), and regulations establishing bookkeeping and reporting requirements. The court observed (App., *infra,* 16a) that the proviso uses the words "involves only * * * rights or obligations * * * under State law," rather than the words "involves only State law." The proviso would be rendered all but meaningless, the court stated, if it were read as inapplicable in any case involving any question of federal law: "[e]very suit with the FSLIC as a party necessarily involves federal law" (*ibid.*). The court concluded that, since all the questions in this case are "subsidiary questions" to the state-law question whether the directors breached their fiduciary duties, and the case involves only rights to recover under state law, the case comes within the proviso of Section 1730(k)(1) (App., *infra,* 16a-17a).[9] The court therefore remanded the case with instructions that it should be dismissed for lack of jurisdiction (*id.* at 18a).

REASONS FOR GRANTING THE PETITION

The court of appeals read the proviso in Section 1730(k)(1) to deny federal-court jurisdiction over this suit, which was brought by the FSLIC, as a receiver appointed by the Bank Board, against persons not listed in the proviso, and which involves the obligations of parties under federal law. That reading is incorrect on several grounds. Four other circuits have reached contrary views. There is a large volume of litigation commenced by the FSLIC as a result of recent failures of state-chartered FSLIC-insured institutions, and it is important that the fundamental jurisdictional question presented by this case be resolved.

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[9] The court also rejected the argument that the proviso was not applicable because the FSLIC had been appointed receiver by the Bank Board rather than by state authorities (App., *infra,* 17a-18a).

1. The court of appeals' decision is incorrect for at least three different reasons. First, the proviso does not apply to a suit that involves the rights or obligations of a non-proviso party—*i.e.*, a person who is not the failed institution, an investor, a creditor, or a stockholder. Second, the proviso does not apply to a suit that involves a claim that the defendants violated "obligations" under federal law, even if the right to damages for that violation arises under state law. Third, the proviso does not limit the federal-agency jurisdiction that Clause (A) and 28 U.S.C. 1345 together grant to the federal courts over suits initiated by the FSLIC acting in either its corporate capacity or its capacity as receiver.

a. The court of appeals erred in concluding that this case "involves only the rights or obligations of investors, creditors, stockholders, and [the failed] institution" (Section 1730(k)(1)). That language is most naturally read to restrict the reach of the proviso to cases that involve the listed parties and no one else. On this straightforward reading, the proviso does not apply here because this case involves the obligations of directors, who as such are not "investors, creditors, [or] stockholders," [10] and it therefore does not "involve[ ] only the rights or obligations" of the parties listed in the proviso. The court of appeals' view (App., *infra*, 13a), under which the proviso applies in every case in which the only claims are those asserted by the receiver on behalf of the failed institution, is contrary to this natural meaning. The fact that each claim in this case involves the rights of the failed institution, for example, does not mean that the case involves "only" such

[10] Respondents are all former directors of Manning. The complaint asserts claims against them in that capacity. It is irrelevant to those claims whether respondents were also shareholders. In any event, three respondents were not shareholders.

rights: this case also involves the obligations of directors, who are not listed in the proviso.

Nothing in the legislative history of Section 1730(k)(1), which is sparse, supports a contrary construction of the proviso. As noted, Section 1730(k)(1) was enacted in 1966. The only commentary on the provision simply described it and observed that it is similar to the proviso in 12 U.S.C. 1819 Fourth, applicable to the FDIC. See S. Rep. 1482, 89th Cong., 2d Sess. 19 (1966); *Financial Institutions Supervisory Act of 1966: Hearings on S. 3158 Before a Subcomm. of the Senate Comm. on Banking and Currency*, 89th Cong., 2d Sess. 319M (1966) (section-by-section analysis of the bill submitted by the FSLIC, FDIC, Federal Reserve Board, and Comptroller of the Currency).[11] The proviso of the FDIC provision had been enacted in 1935.[12] Banking Act of 1935, ch. 614, § 101, 49 Stat. 692 (codified originally at 12 U.S.C. (1940 ed.) 264(j) Fourth). That proviso applied only to suits that involved only the rights or obligations of "depositors, creditors, stockholders and [the failed] bank" under state law. Its legislative history, too, offers no explanation for the listing of particular persons: the House and Senate Committee Reports merely give oversimplified descriptions of the provision. H.R. Rep. 742, 74th Cong., 1st Sess. 4 (1935); S. Rep. 1007, 74th Cong., 1st Sess. 5 (1935).[13]

[11] The House Report, H.R. Rep. 2077, 89th Cong., 2d Sess. (1966), does not discuss the provision.

[12] 12 U.S.C. 1819 Fourth was amended in the same 1966 legislation that contained Section 1730(k)(1) to add an express provision for removal of actions to federal court and to eliminate the jurisdictional amount requirement for federal-question jurisdiction. Financial Institutions Supervisory Act of 1966, Pub. L. No. 89-695, § 205, 80 Stat. 1055. The proviso was not altered.

[13] The House Report (H.R. Rep. 742, at 4) states: "Under the provisions of title I [of the Act], Federal courts have jurisdiction over suits

The identities of the parties listed in the proviso of Section 1730(k)(1) suggest the reason for the listing. The receiver for a failed state-chartered financial institution will often have reason to bring suit against a variety of persons, including borrowers, guarantors, and other debtors, as well as those in a relationship of trust with the failed institution, such as directors, officers, attorneys, accountants, and other professionals. See, *e.g.*, 12 U.S.C. 1729(b) and (d), 1821(d); 12 C.F.R. 548.2, 549.3; *FSLIC* v. *Dixon*, 835 F.2d 554, 562 (5th Cir. 1987). If Congress had meant the proviso to reach all such claims by a receiver, it could easily have said so. Instead, it listed, in addition to the failed institution itself, only "investors, creditors, [and] stockholders" of the receivership estate.[14] The evident purpose was to cover only cases involving the rights or obliga-

to which the Corporation is a party where the amount involved exceeds $3,000, but an exception is made where the Corporation is a party in its capacity as receiver of a State bank." The Senate Report (S. Rep. 1007, at 5) states: "new matter is added giving jurisdiction, in the case of suits of a civil nature to which the Corporation is a party, to courts having jurisdiction of suits arising under the laws of the United States. It is provided that any suit to which the Corporation is a party in its capacity as receiver of a State bank and which involves only rights to be determined according to State laws shall not be deemed to arise under the laws of the United States."

The jurisdictional provision was recodified without change as part of 12 U.S.C. (1952 ed.) 1819 Fourth by the Federal Deposit Insurance Act of 1950, ch. 967, § 2, 64 Stat. 881. Nothing in the committee reports comments on the provision. See S. Rep. 1269, 81st Cong., 2d Sess. (1950); H.R. Rep. 2564, 81st Cong., 2d Sess. (1950); H.R. Conf. Rep. 3049, 81st Cong., 2d Sess. (1950).

[14] We read the term "creditors" in this context as encompassing all persons with claims against the receivership estate, whether based on contract or tort. See 11 U.S.C. (& Supp. IV) 101(9) (bankruptcy code definition of "creditor"); 12 C.F.R. 569a.1-569a.8 (treating all claims against the estate of a state-chartered institution in FSLIC receivership as "creditor" claims).

tions of the persons who have claims on the assets of the failed institution, not cases involving claims the receiver has against "outsiders."

Thus interpreted, the proviso draws a sensible line. The process of evaluating creditor and stockholder claims against the estate, and distributing its assets, may be appropriately carried out, in the case of a state-chartered institution, in a state court or administrative proceeding.[15] In contrast, there is no special reason for state-court jurisdiction over suits by the receiver against outsiders—notably, the collection of estate assets in suits against debtors. No single court would ordinarily have personal jurisdiction over the defendants in all such suits, and it seems entirely plausible that Congress wanted to assure the FSLIC of access to federal courts to pursue such claims.[16] The proviso reflects this distinction (refining it

[15] At the time Congress enacted Section 1730(k)(1) in 1966, there was a much sharper distinction between state-chartered and federally chartered FSLIC-insured institutions. Before 1968, when subsections 1729(c)(2) and (3) were added, a state-chartered institution could be placed in receivership only by state authorities, even if the FSLIC was named receiver, and the FSLIC served subject to state supervision. 12 U.S.C. (1964 ed.) 1729(c) and (d). As for the FDIC, it has been true since its creation that only the appropriate state authority may appoint it receiver of a state bank. 12 U.S.C. 1821(e).

[16] This differential treatment of jurisdiction over claims against the estate, which are often centralized in a single supervisory court, and jurisdiction over claims by the receiver to collect estate assets from outsiders, which are not centralized, corresponds to federal bankruptcy practice (11 U.S.C. (& Supp. IV) 501, 704; 28 U.S.C. (Supp. IV) 1334(d)) and to state laws governing statutory receiverships, notably those involving failed banks (see, *e.g.*, Ill. Stat. Ann. ch. 17, paras. 371, 372 (Smith-Hurd 1981 & Supp. 1987); N.Y. Banking Law §§ 618, 619 (McKinney 1971)). Similarly, 12 U.S.C. 94 specifies a single venue for all actions against a national banking association for which the FDIC has been made receiver or against the FDIC in such capacity, whereas it does not specify a single venue for suits by the FDIC as receiver.

even one step further): when claims against the estate of a state-chartered institution involve only rights or obligations under state law, the proviso states that such claims do not arise under federal law, which commonly means that they may be adjudicated in a single state court having supervisory authority over the receivership.

b. The court of appeals also erred in holding that this case "involves only the rights or obligations" of the parties "under State law" (Section 1730(k)(1)). As a matter of plain statutory language, the proviso does not apply to a case that involves the obligations of defendants under federal law. This is such a case, because it involves the obligations of the respondent directors under federal law: the FSLIC has asserted, in support of the claim of breach of fiduciary duties, that respondents failed to comply with various federal-law obligations, including those under criminal laws, a cease-and-desist order, and FSLIC regulations establishing net worth and reserve requirements.[17]

The court of appeals drew a contrary conclusion because the relevant provisions of federal law do not themselves give rise to the cause of action. The court noted (App., *infra,* 16a) that the proviso speaks of "rights or obligations * * * under State law," not of claims that "involve[] only State law." But this case does involve the "obligations" of respondents under federal law. The court of appeals would read the proviso as if it covered all claims except those "arising under" federal law, but that is not

[17] Although the net worth and reserve regulations directly apply only to the institution, they impose obligations on the institution's directors. The FSLIC has the authority under 12 U.S.C. 1730(e) to initiate cease-and-desist proceedings against directors who take action to place the institution in violation of the regulations. The FSLIC also has authority to suspend or remove directors for sufficiently harmful breaches of fiduciary duty. 12 U.S.C. 1730(g).

how the proviso is written. Indeed, Congress's failure to use that familiar terminology in defining what suits are within the proviso's coverage is especially telling, because Section 1730(k)(1) elsewhere uses the words "arise under" in two places, once in the proviso itself. Had Congress wished the proviso to apply in all cases where federal law is not the source of the cause of action, it surely would have said so.

The court of appeals' view that the proviso applies whenever the source of the cause of action is state law, even if the claim involves questions of federal law, ignores the obvious policy behind the inclusion of the "under State law" restriction in the proviso. By restricting the proviso to cases that involve "only rights to be determined according to State laws," as the Senate Report described the FDIC's proviso upon its enactment in 1935 (S. Rep. 1007, 74th Cong., 1st Sess. 5 (1935)), Congress left to the state courts cases that are peculiarly within their expertise. In light of Section 1730(k)(1)'s otherwise plenary grant of jurisdiction to the federal courts to hear cases involving the FSLIC, there is no warrant for reading the proviso to exclude from federal-court jurisdiction cases that may involve numerous questions of the proper interpretation of federal law.[18]

Finally, contrary to the court of appeals' view, giving the proviso its natural reading—restricting it to cases that involve only questions of state law—would not bring into federal court "[e]very suit with the FSLIC as a party" (App., *infra,* 16a). To be sure, suits like this one against

[18] In 1968 and 1982, after the enactment of Section 1730(k)(1), Congress authorized the Bank Board to appoint the FSLIC as receiver of a state-chartered institution. See note 19, *infra.* Although we do not so contend in this case, there may be cases in which the fact that the FSLIC was appointed receiver by the Board establishes that the case is not within the proviso.

directors will very often involve federal-law questions, because of the extensive federal regulation of FSLIC-insured institutions. But claims by proviso parties against the assets of the failed institution will often involve only questions of state law. As explained above, those claims are what the proviso, in a natural reading, is addressed to.

c. The court of appeals further erred in holding that the proviso deprives the district court of the jurisdiction it appears to have under 28 U.S.C. 1345. That section states that, except as otherwise provided by law, the federal courts have jurisdiction over suits commenced by an "agency" of the United States expressly authorized to sue by act of Congress. This suit meets the requirements for jurisdiction under that provision.

This suit was commenced by the FSLIC. Clause (A) of Section 1730(k)(1) provides that the FSLIC is an "agency" for purposes of 28 U.S.C. 451, the section that defines "agency" for purposes of 28 U.S.C. 1345. And the FSLIC is authorized "[t]o sue and be sued," 12 U.S.C. 1725(c)(4), and has broad powers to take the actions it deems appropriate as receiver of a failed institution. See 12 U.S.C. 1729(c) and (d).[19]

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[19] Moreover, at least where, as here, the FSLIC is appointed receiver by the Bank Board, rather than by state authorities, its authority to bring suits where necessary is solely dependent on federal and not state law. Section 1729(d) makes the FSLIC here, as receiver liquidating an insured institution, "subject only to the regulation of" the Bank Board, and not to any state authority in the execution of its responsibilities. Congress made this clear in 1982, when it also added the provision (Section 1729(c)(1)(B)) under which the Board appointed the FSLIC receiver in this case. Garn-St Germain Depository Institutions Act of 1982, Pub. L. No. 97-320, § 122(d) and (g), 96 Stat. 1482.

Congress first provided for federal appointment of the FSLIC as receiver of a state-chartered institution in 1968, when it added subsections 1729(c)(2) and (3). Bank Protection Act of 1968, Pub. L. No. 90-389, § 6, 82 Stat. 295-296. It indicated at that time that FSLIC, once appointed, would not be subject to the regulation "of any State authority, administrative or judicial." S. Rep. 1263, 90th Cong., 2d Sess. 10 (1968); 114 Cong. Rec. 18298-18299 (1968) (remarks of Rep. Patman); *Savings and Loan Receiverships: Hearings on S. 3436 Before the Senate Comm. on Banking and Currency*, 90th Cong., 2d Sess. 7 (1966) (testimony of Bank Board Chairman).

The plain terms of the proviso of Section 1730(k)(1) make clear that it does not override the jurisdiction granted by 28 U.S.C. 1345. The proviso states only that suits described therein "shall not be deemed to arise under the laws of the United States." Jurisdiction under 28 U.S.C. 1345, however, does not depend on whether the claim arises under federal law: Section 1345 grants jurisdiction whenever the plaintiff is a federal agency, regardless of the nature of the claim.

The court of appeals, instead of being guided by the statutory language, simply asserted (App., *infra*, 11a-12a) that Congress did not intend there to be Section 1345 jurisdiction over cases within the proviso. The court of appeals did not point to any legislative history that expresses an intent contrary to the statutory text. Instead, it argued first that Congress added Clause (A) in 1966 merely "to clarify that the FSLIC was an agency" after the issue had been litigated in *Acron Investments, Inc.* v. *FSLIC, supra*, and second that since Clause (B) of Section 1730(k)(1) applies both when the FSLIC is a party defendant and when it is a party plaintiff, Congress must have intended the proviso to apply equally to both situations and hence to limit Clause (A) as well. There are several problems with these arguments.

First, if Congress added Clause (A) to reaffirm what the FSLIC had just won in *Acron*,[20] the point of doing so

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[20] In fact, there is no mention of *Acron* in the legislative history of the 1966 enactment.

must have been to make clear what the language says and *Acron* holds, namely that the FSLIC is an agency such that any suit commenced by it may be brought in federal court under 28 U.S.C. 1345. If the court of appeals' view that the proviso limits both Clause (B) and Clause (A) is correct, it is not clear why Congress saw any need to reaffirm *Acron* or include Clause (A) at all, because Clause (A) and the *Acron* ruling then add nothing to Clause (B), which confers jurisdiction whenever the FSLIC is a party and the proviso does not apply.[21] If instead, as the language of the proviso suggests, the proviso limits only Clause (B) jurisdiction, then Clause (A) serves to clarify that, where the FSLIC is a plaintiff, the federal courts do have "agency" jurisdiction under 28 U.S.C. 1345 even though the suit is not one deemed to arise under federal law. This reading of Section 1730(k)(1) is the only one that gives any independent significance to Clause (A).[22]

The court of appeals' concern about allowing Section 1345 to diminish the significance of the proviso rests on a misconception of its purpose. As explained above, the proviso lists specified parties because it is concerned with

[21] Our reading does involve a partial overlap of Clause (A) and Clause (B): where the FSLIC commences the suit and the proviso does not apply, both Clauses confer jurisdiction. But there has never been any general concern to eliminate overlap of jurisdictional provisions, and many cases fall within more than one grant of jurisdiction. Moreover, Clause (B) of 12 U.S.C. 1730(k)(1) overlaps considerably at least with both 28 U.S.C. 1345 (federal agency jurisdiction) and 28 U.S.C. 1331 (federal question jurisdiction).

[22] The court of appeals noted that 28 U.S.C. 1345 begins "[e]xcept as otherwise provided" and stated that Section 1730(k)(1) provides the necessary overriding "polic[y]" (App., *infra*, 12a). But a "policy" standing alone could not override the language of Section 1345. In any event, the court of appeals failed to identify any policy that lay behind and fully accounts for all of Section 1730(k)(1) and that overrides Section 1345.

claims against the assets of the failed institution held in the receivership estate. Suits involving such claims would rarely if ever have been commenced by the FSLIC. Section 1345 thus does not grant jurisdiction over any appreciable number of cases that fall within the proviso properly construed.

Nothing in any legislative history is contrary to the plain meaning of Section 1345 and Section 1730(k)(1). The 1966 Congress that enacted Section 1730(k)(1) merely took note that the FDIC's provision, 12 U.S.C. 1819 Fourth, did not contain an express declaration that the FDIC was an agency: it did not otherwise explain the difference between the treatment of the FSLIC and the FDIC (see sources cited page 11, *supra*).[23] Nothing in the 1935 legislative history of 12 U.S.C. 1819 Fourth deals with Section 1345 jurisdiction, because Congress did not provide for general federal-agency plaintiff jurisdiction, as 28 U.S.C. 1345 now does, until 1948. Act of June 25, 1948, ch. 646, 62 Stat. 933.[24] And there is no reason why the considerations that led Congress to enable federal agencies to bring actions in federal courts, whether or not they arise under federal law, should not apply fully to the FSLIC's suits brought against directors and officers of a failed institution. The FSLIC is a federal agency; it serves as receiver of state-chartered institutions like Manning at the behest of the Bank Board; it does so not only to put the affairs of the institution in order but to serve important purposes of the federal

[23] The Fifth Circuit in *FDIC* v. *Sumner Financial Corp.*, *supra*, thought the distinction might be significant. See note 8, *supra*.

[24] The absence of such jurisdiction, together with the fact that there may be cases where the FSLIC or FDIC as receiver does sue a proviso party, explains why the provisos are written to apply when the FSLIC or FDIC is a "party" rather than a "defendant." The 1966 Congress merely borrowed the language of the proviso from 12 U.S.C. 1819 Fourth without focusing on its relation to Clause (A).

regulatory and insurance programs; it was thus altogether appropriate for Congress to give the FSLIC the general power to proceed in federal court.

2. Four courts of appeals have reached results contrary to that reached by the court of appeals in this case, ruling that the Section 1730(k)(1) proviso was rendered inapplicable because of the presence of a non-proviso party. The Sixth Circuit in *Andrew D. Taylor Trust* v. *Security Trust Federal Savings & Loan Ass'n, Inc.*, No. 86-6287 (Apr. 12, 1988), slip op. 8, ruled that the proviso did not apply because of the presence in the suit of a non-proviso party.[25] The Ninth Circuit in *Fidelity Financial Corp.* v. *FSLIC*, 834 F.2d 741, 744-745 (1987), ruled that the proviso did not apply because the rights of several non-proviso parties were at stake in the suit.[26] The Fifth Circuit in *North Mississippi Savings & Loan Ass'n* v. *Hudspeth*, 756 F.2d 1096, 1100 (1985), cert. denied, 474 U.S. 1054 (1986), ruled that the proviso did not apply because the counterclaimant sued and demanded damages from a new institution that "was neither an investor, creditor, nor stockholder" of the failed institution. Although the case involved non-proviso parties on both sides of one of the claims at issue,[27] the opinion does not rely on that fact, and the Sixth Circuit's *Taylor* decision

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[25] The court ruled in the alternative that the proviso did not apply because the case involved the FSLIC in its corporate capacity. Slip op. 7-8.

[26] The court also ruled (834 F.2d at 745) that the proviso did not apply because the case involved claims that concerned the FSLIC's actions as receiver, claims that, because the FSLIC was appointed by the Bank Board, were governed by federal law.

[27] The court below distinguished *Hudspeth* on the ground that, there, "resolution of the rights and obligations of the parties listed in the proviso would not settle the case," whereas in this case it would (App., *infra*, 15a).

(slip op. 8) read *Hudspeth* as holding the proviso inapplicable simply because of the presence of the non-proviso party.[28] Finally, the Eleventh Circuit in *American National Bank* v. *FDIC*, 710 F.2d 1528, 1533 n.5 (1983), held the FDIC's proviso in 12 U.S.C. 1819 Fourth inapplicable because a non-proviso party was the stakeholder in the dispute.

It would not be altogether impossible to reconcile the contrary results in these cases, but it is clear that the courts of appeals have widely differing views on the meaning of the proviso.[29] There already is, and there will continue to be, a substantial volume of litigation in the lower courts on these jurisdictional issues. Further resources should not be devoted to litigating where cases commenced by the FSLIC as receiver for a state-chartered institution should be brought.

The FSLIC, when acting as receiver for state-chartered institutions, has routinely filed suits like this one in federal

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[28] The Fifth Circuit in *FDIC* v. *Sumner Financial Corp., supra*, adopted a reading of 12 U.S.C. 1819 Fourth contrary to *Hudspeth*'s reading of Section 1730(k)(1).

[29] The court of appeals in this case found support in holdings or statements in five cases, two in its own circuit, that involved the FDIC's proviso, 12 U.S.C. 1819 Fourth. App., *infra*, 14a-15a. In *FDIC* v. *Elefant*, 790 F.2d 661, 663 (7th Cir. 1986), the FDIC itself took the position—though it was not then and is not now the official agency position—that the proviso deprived the federal courts of jurisdiction even where the suit involved a debtor (a non-proviso party). In *FDIC* v. *Braemoor Associates*, 686 F.2d 550, 552 (7th Cir. 1982), cert. denied, 461 U.S. 927 (1983), the statements about the FDIC in its capacity as receiver were dicta, because the suit involved the FDIC in its corporate capacity, to which the proviso by its terms is inapplicable. And both *FDIC* v. *La Rambla Shopping Center, Inc.*, 791 F.2d 215, 220 (1st Cir. 1986), and *In re F&T Contractors, Inc.*, 718 F.2d 171 (6th Cir. 1983), involved claims by creditors of the failed institution, who are expressly named in the proviso. See also *FDIC* v. *Sumner Financial Corp., supra*.

court. Many pending cases, if now dismissed for want of jurisdiction, could not be recommenced in state court because of statutes of limitations or other problems due to the lapse of time. The FSLIC insurance fund is under severe financial strains. Eight FSLIC-insured state-chartered institutions were placed in liquidating receiverships in 1987, and the FSLIC, as of January 1, 1988, was acting as liquidating receiver for 39 state-chartered institutions. As a result of the numerous failures, the FSLIC has commenced in federal court many suits against outsider defendants alleged to owe money to the institution, and hundreds of millions of dollars are at stake in those suits. This case is an appropriate one for this Court to clarify the meaning of Section 1730(k)(1) and to ensure that FSLIC has access to federal court in circumstances like those presented here.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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MAY 1988

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 85-1989

FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, AS RECEIVER FOR MANNING SAVINGS AND LOAN ASSOCIATION,
PLAINTIFF-APPELLEE

v.

HAROLD J. TICKTIN, JOSEPH J. TICKTIN, WILLIAM HEATON, HAROLD BROWN, AND JUDITH TICKTIN,
DEFENDANTS-APPELLANTS

Argued Jan. 7, 1987
Decided Nov. 2, 1987

Before: WOOD AND RIPPLE Circuit Judges, and ESCHBACH, Senior Circuit Judge.

ESCHBACH, Senior Circuit Judge.

This appeal requires us to interpret the statutory provision that governs the federal district courts' jurisdiction of cases in which the Federal Savings and Loan Insurance Corporation is a party, 12 U.S.C. § 1730(k)(1). The FSLIC, acting as receiver of a savings and loan, brought this suit under Illinois law against the directors of the institution alleging breach of their fiduciary duties. The defendants moved the court to dismiss the suit for lack of subject matter jurisdiction. The district court held that because part A of § 1730(k)(1) deems the FSLIC to be an agency of the United States, the court had jurisdiction to

hear this suit under the general grant of jurisdiction of suits brought by agencies of the United States, 28 U.S.C. § 1345. The court, explicitly basing its ruling solely on *Federal Savings and Loan Insurance Corporation v. Krueger,* 435 F.2d 633 (7th Cir. 1970), held that the proviso in § 1730(k)(1) that denies federal jurisdiction of suits where the FSLIC, acting as a receiver, seeks to enforce the rights of the institution under state law was inapplicable because it applies only in cases that have been removed from state court. The district court certified the order for interlocutory appeal under 28 U.S.C. § 1292(b), finding that the viability of this holding of *Krueger,* in light of more recent authority, presented a controlling question of law as to which there was a substantial ground for difference of opinion. We will overrule the pertinent part of *Krueger* and hold that the scope of the proviso is not so limited. We will reverse and remand with instructions to dismiss for lack of subject matter jurisdiction.

I

Because this appeal involves only the subject matter jurisdiction of the district court, we limit our recitation of the facts accordingly. The Federal Savings and Loan Insurance Corporation ("FSLIC"), acting as receiver of Manning Savings and Loan Association ("Manning"), filed this suit against defendants, former directors of Manning, for breach of their fiduciary duties to Manning under Illinois law. Manning was a state-chartered, FSLIC-insured institution. The FSLIC alleges that the directors declared two illegal dividends.

The directors declared the first dividend on March 1, 1980. The Illinois Savings and Loan Commissioner later determined that the declaration was in violation of Illinois law because Manning's net worth was insufficient. The Commissoner ordered the directors to recover the dividend. The FSLIC issued a "Notice of Charges and Hear-

ing" for failing to meet federal net worth requirements under 12 U.S.C. § 1726(b) and 12 C.F.R. § [563.13]. The FSLIC also issued a cease-and-desist order that, as modified, prohibited Manning from paying further dividends on capital stock that were not in accordance with state law. The directors subsequently declared a stock dividend.

On February 3, 1983, the Federal Home Loan Bank Board appointed FSLIC receiver for Manning, acting under 12 U.S.C. § 1729(c)(1)(B). The FSLIC filed this suit in the United States District Court for the Northern District of Illinois, alleging that the directors breached their fiduciary duties in declaring the two dividends. Defendants moved to dismiss for lack of subject matter jurisdiction, on the basis of a jurisdiction limiting proviso in the jurisdictional statute relating to the FSLIC, 12 U.S.C. § 1730(k)(1). The district court denied the motion on the authority of two opinions of this court from 1970 and 1971 that held that the proviso applied only in cases that had been removed from state court. Because of the uncertainty of the continued viability of that holding, the district court subsequently granted defendants' motion to certify the order denying dismissal under 28 U.S.C. § 1292(b).[1] This court granted defendants permission to appeal.

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[1] 28 U.S.C. § 1292(b) reads:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Pro-*

II

At issue in this case is the statute that grants federal jurisdiction in cases involving the FSLIC, 12 U.S.C. § 1730(k)(1):

> Notwithstanding any other provision of law, (A) the Corporation shall be deemed to be an agency of the United States within the meaning of section 451 of Title 28; (B) any civil action, suit, or proceeding to which the Corporation shall be a party shall be deemed to arise under the laws of the United States, and the United States district courts shall have original jurisdiction thereof, without regard to the amount in controversy; and (C) the Corporation may, without bond or security, remove any such action, suit, or proceeding from a State court to the United States district court for the district and division embracing the place where the same is pending by following any procedure for removal now or hereafter in effect: *Provided*, that any action, suit, or proceeding to which the Corporation is a party in its capacity as conservator, receiver, or other legal custodian of an insured State-chartered institution and which involves only the rights of obligations of investors, creditors, stockholders, and such institution under State law shall not be deemed to arise under the laws of the United States.

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vided, however, that application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

In certifying the order, the district court stated, "The issue certified is whether Krueger's holding that § 1730(k)(1) applies only to removal actions is of continuing viability in light of the authorities cited on pages 2-4 of the September 19, 1984 opinion." This court's review is not restricted to that question, however. "The question, is the reason for the interlocutory appeal, but the thing under review is the order." *Edwardsville National Bank and Trust Company v. Marion Laboratories, Inc.*, 808 F.2d 648, 650 (7th Cir. 1987).

The ordinary meaning of the section would seem to be clear. To paraphrase, part A states that the FSLIC is deemed to be an agency of the United States; part B states that suits to which the FSLIC is a party are deemed to arise under the laws of the United States and that district courts have original jurisdiction of such suits; part C states that when such a suit is brought in state court, the FSLIC may remove it to federal court; and the final clause (the "proviso") excludes certain suits from the general rule stated in B. The statute on its face seems clearly to grant original jurisdiction in the district courts to all suits to which the FSLIC is a party, subject only to the exception in the proviso.

This court has, however, read the statute in a different way. *Federal Savings and Loan Insurance Corporation v. Krueger*, 435 F.2d 633, 636 (7th Cir.1970). Today we reconsider and overrule the pertinent part of that opinion. In *Krueger*, we addressed the issue briefly. We held first that because part A deemed the FSLIC to be an agency, there was subject matter jurisdiction of the case under 28 U.S.C. § 1345, which grants jurisdiction to suits brought by agencies of the United States. We next addressed the effect of the jurisdiction limiting proviso, although the parties apparently did not address the issue:

> It might be argued that the proviso contained in the latter portion of section 1730(k)(1) is applicable. We are of the view, however, that subsections (B) and (C) of section 1730(k)(1), including the proviso, relate solely to removal proceedings from state courts in actions wherein the corporation has been made a party. *See Federal Savings and Loan Insurance Corp. v. Quinn*, 419 F.2d 1014 (7th Cir.1969).

The cited case, *Quinn,* had referred to section 1730(k)(1) as a "special removal statute." The section is clearly more than just a removal statute; it is also the statute that provides original jurisdiction for suits involving the FSLIC, whether indirectly through part A or directly under part B. *Quinn* did not address the issue, whether subsection B and C relate only to removal proceedings.

We relied on *Krueger* in *Katin v. Apollo Savings,* 460 F.2d 422 (7th Cir. 1971), *cert. denied,* 406 U.S. 918, 92 S.Ct. 1767, 32 L.Ed.2d 117 (1972). There we said simply, "Defendants here invite the court to reconsider that holding or to distinguish *Krueger* from the instant case. We reaffirm *Krueger.*" *Id.* at 424.

Reading the section as *Krueger* did to mean that parts B and C relate only to removal proceedings gives an unusual effect to the statute. It grants federal jurisdiction to all cases where the FSLIC is the plaintiff. It grants federal jurisdiction to no cases brought in federal court where the FSLIC is the defendant, but grants federal jurisdiction where the FSLIC is a defendant in a case brought in state court and the FSLIC removes the case to federal court. Thus, the FSLIC is able to remove to the federal courts a suit that the plaintiff could not have brought in federal court. It further makes half redundant the provision in part B that suits to which the FSLIC shall be a party shall be deemed to arise under federal law; removal by the FSLIC would involve only suits in which the FSLIC was a defendant. This anomalous reading conflicts directly with the plain language of part B that the district courts "shall have *original* jurisdiction" (emphasis added) of all cases to which the FSLIC is a party.

We have interpreted language almost identical to parts B and C of § 1730(k)(1) to be a grant of original jurisdiction, not just to relate to removal. *Federal Deposit Insurance Corporation v. Braemoore Associates,* 686 F.2d

550 (7th Cir. 1982), *cert. denied,* 461 U.S. 927, 103 S.Ct 2086, 77 L.Ed.2d 297 (1983). 12 U.S.C. § 1819 Fourth grants jurisdiction to suits where the FDIC is a party:

> All suits of a civil nature at common law or in equity to which the Corporation shall be a party shall be deemed to arise under the laws of the United States, and the United States district courts shall have original jurisdiction thereof, without regard to the amount in controversy; and the Corporation may, without bond or security, remove any such action, suit, or proceeding from a State court to the United States district court for the district or division embracing the place where the same is pending by following any procedure for removal now or hereafter in effect, except that any such suit to which the Corporation is a party in its capacity as receiver of a State bank and which involves only the rights or obligations of depositors, creditors, stockholders, and such State bank under State law shall not be deemed to arise under the laws of the United States.

In *Braemoor,* we held the language in the above provision that is substantially the same as part B of § 1730(k)(1) to be a grant of original jurisdiction that was limited by a proviso that is substantially the same as the proviso in § 1730(k)(1). As discussed below, the one significant difference between the two statutes is that the FDIC statute does not have a counterpart to part A of § 1730(k)(1).

The history of the FDIC statute is also enlightening in this case. Its predecessor statute, 12 U.S.C. § 1819, made no mention of removal:

> All suits of a civil nature at common law or in equity to which the Corporation shall be a party shall be deemed to arise under the laws of the Untied States: Provided that any such suit to which the Corporation

> is a party in its capacity as receiver of a State Bank and which involves only the rights or obligations of depositors, creditors, stockholders, and such state bank under state law shall not be deemed to arise under the laws of the United States.

That statute contained only the grant of original jurisdiction and the limiting proviso. This supports the proposition that the substantially similar language in § 1730(k)(1) is a grant of original jurisdiction and a limiting proviso.

The act that amended the provision above to its present form in § 1819 Fourth (the section that is substantially the same as § 1730(k)(1)) was the same act that included § 1730(k)(l), the Financial Institutions Supervisory Act of 1966, P.L. 89-695, 80 Stat. 1055 (1966). §1730(k)(1) was clearly drafted by borrowing from § 1819 Fourth and its predecessor; indeed, the statutes even share the same somewhat idiosyncratic capitalization conventions. The drafters noted this borrowing for the record: "The provisions of subsection (k)(1), with the exception of clause (A), therefore, are similar to existing law applicable to. . . the Federal Deposit Insurance Corporation (12 U.S.C. 1819)." Senate Report No. 1482, reprinted in 1966 U.S.Code Cong. & Admin.News, p. 3550.

One other cirucit has considered our holding in *Krueger* that part B and C of § 1730(k)(1) relate only to removal proceedings and squarely rejected it. *Hancock Financial Corporation v. Federal Savings and Loan Insurance Corporation*, 492 F.2d 1325 (9th Cir.1974).

> We are confident that this clause was intended to constitute a grant of original jurisdiction, enabling the FSLIC to be sued in federal district court. *See* S.Rep. No. 1482, 89th Cong., 2d Sess., 1966 U.S. Code Cong. & Admin.News, pp. 3532, 3550. We reach this conclusion in spite of some dicta in recent opinions of

> the Court of Appeals for the Seventh Circuit suggesting that clause (B) relates solely to removal proceedings by the FSLIC in actions which it has been made a party. (citations to *Katin* and *Krueger*)

Id. at 1328 n. 2.[2] Hancock had filed suit against the FSLIC to enjoin it from selling certain assets. The court held that because the suit fell within the proviso, the grant of original jurisdiction in part B did not apply and the district court was correct in dismissing the action for lack of subject matter jurisdiction.

Hancock also shows how strange it would be to read parts B and C as relating only to removal proceedings. In that case, the FSLIC was the defendant. If part B does not grant original jurisdiction, a plaintiff could not bring suit against the FSLIC in federal court under § 1730(k)(1). But if the suit is brought in state court, as long as it did not fall within the proviso, the FSLIC could remove it to federal court and the court would have jurisdiction. This reading is refuted by the legislative history of the statute and the relevant case law.

It is clear that part B was intended to be what it reads to be, a grant of original jurisdiction to the federal district courts to hear cases to which the FSLIC is a party. This grant is limited by the proviso. The next question, however, is the effect of part A, which deems the FSLIC to be an agency of the United States. 28 U.S.C. § 1345 provides that the district courts have jurisdiction of cases where the plaintiff is an agency of the United States, provided that the agency is expressly authorized to sue by Act

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[2] *Hancock* referred to the statements in *Krueger* and *Katin* that parts B and C of § 1730(k)(1) related only to removal proceedings as "dicta." The reasoning that this court followed in those cases makes the statements holdings and we characterized them as such. *Katin*, 460 F.2d at 424.

of Congress, as is the FSLIC, 12 U.S.C §1725(c)(4). If the FSLIC is the plaintiff in a suit and the court lacks jurisdiction under part B because the suit falls into the exclusion of the proviso, does the court have jurisdiction under the more general agency jurisdiction of 28 U.S.C. § 1345?

The court in *Federal Deposit Insurance Corporation v. Sumner Financial Corporation,* 602 F.2d 670 (5th Cir. 1979), addressed persuasively a similar question under § 1819 Fourth. As discussed above, § 1819 Fourth is substantially the same as parts B and C of § 1730(k)(1): it contains a general grant of jurisdiction of cases to which the FDIC is a party, with the exception of the cases in the proviso. The court in *Sumner* faced the issue, whether, in a case where the FDIC is the plaintiff but the court does not have jurisdiction under § 1819 Fourth because the case falls within the proviso, the court would have jurisdiction under 28 U.S.C. § 1345 because the FDIC is an agency of the United States.

The court held that, although the FDIC is an agency for the purposes of 28 U.S.C. § 1345, jurisdiction did not lie under that section because "the proviso is to be read as stating an absolute limitation on federal jurisdiction over cases to which FDIC is a party." *Id.* at 678. The court interpreted § 1819 Fourth to be "a self-contained scheme for jurisdiction over cases involving FDIC." *Id.* Were agency jurisdiction available despite the fact that the case fell within the proviso, "this scheme would be destroyed and the proviso would be effectively read out of this statute." *Id.* at 679.

The *Sumner* court also rejected for the same reason a proposed basis of jurisdiction that the parties did not argue in this case, diversity of citizenship under 28 U.S.C. § 1332. This court has recently followed *Sumner* in holding that diversity of citizenship will not provide

jurisdiction in a case involving the FDIC where the case falls into the jurisdiction limiting proviso of § 1819 Fourth. *Federal Deposit Insurance Corporation v. Elefant,* 790 F.2d 661 (7th Cir.1986) ("§ 1819 Fourth would become an empty shell if litigation involving the FDIC could come to court on the basis of diversity."). We also implicitly followed *Sumner*'s holding that no resort could be made to agency jurisdiction under 28 U.S.C. § 1345 in such a case.

As noted in *Sumner*, § 1730(k)(1) does differ from § 1819 Fourth in that part A makes explicit that the FSLIC is an agency of the United States. § 1819 Fourth contains no comparable provision, although the *Sumner* court and other courts have assumed that the FDIC is an agency of the United States. The question remains, then, whether by including part A in § 1730(k)(1) Congress intended to make the jurisdiction limiting proviso inapplicable to cases in which the FSLIC is the plaintiff. Our consideration of the statute and its legislative history convinces us that Congress did not and that the proviso applies in cases, like the present one, where the FSLIC appears as plaintiff.

According to the legislative history, the purpose of part A was to "make clear that the Corporation is an agency of the United States." 1966 U.S.Code Cong. and Admin. News, p. 3550. The need for a clarification appears from the contemporaneous case, *Acron Investments, Inc. v. Federal Savings and Loan Insurance Corporation,* 363 F.2d 236 (9th Cir.), *cert. denied,* 385 U.S. 970, 87 S.Ct. 506, 17 L.Ed.2d 434 (1966). The FSLIC was the plaintiff in that case. Because the suit was filed before the enactment of § 1730(k)(1), the only ground for jurisdiction was agency jurisdiction under 28 U.S.C. § 1345. The district court held that the FSLIC was an agency for the purposes of 28 U.S.C. § 1345, but considered the question a close

one: it, like the district court in this case, certified the order under 28 U.S.C. § 1292(b) as involving a controlling question of law as to which there was substantial ground for differences of opinion. The Ninth Circuit granted permission to appeal and affirmed the holding that the FSLIC was an agency and that there was jurisdiction of the case under 28 U.S.C. § 1345.

Section A of § 1730(k)(1) was passed to clarify that the FSLIC was an agency. Thus, in general, cases in which the FSLIC was plaintiff would fall within the jurisdiction of the federal courts under 28 U.S.C. § 1345. But the same section in part B provided a grant of jurisdiction with the same effect: part B grants jurisdiction of cases in which the FSLIC is a party, and thus *a fortiori* of cases in which the FSLIC is the plaintiff. Part B qualifies this grant. It is clear that in including the proviso in § 1730(k)(1) Congress intended to exclude the cases that fall within the proviso from the jurisdiction of the federal courts. Indeed, 28 U.S.C. § 1345 explicitly contemplates that the policies involving particular agencies will lead to qualifications on its general grant of jurisdiction to suits brought by agencies of the United States. It begins "Except as otherwise provided by Act of Congress . . ." We cannot read part A to grant jurisdiction indirectly in those cases that were deliberately and specifically excluded from the jurisdiction granted by part B. Had Congress intended this result, it would surely have chosen a less anfractuous route.

III

We now consider the question, whether this case falls within the proviso, which denies jurisdiction to "any action, suit, or proceeding to which the Corporation is a party in its capacity as conservator receiver or other legal custodian of an insured State-chartered institution and

which involvs only the rights or obligations of investors, creditors, stockholders, and such institution under state law."

Because of a paucity of case law interpreting the language of the proviso, we will borrow heavily from cases decided under § 1819 Fourth, which, as noted, contains a substantially similar proviso. In using § 1819 Fourth cases to interpret § 1730(k)(1) above, we faced the difference that § 1819 Fourth did not contain a counterpart to part A of § 1730(k)(1). That problem does not present itself in regard to the more specific question of the meaning of the proviso, for the two provisos are substantially the same.

The FSLIC first argues that the proviso does not apply to the present case because the fact that the suit is brought by the FSLIC as receiver of Manning against its former directors makes it not a suit "which involves only the rights or obligations of investors, creditors, stockholders, and such institution. . . ." The FSLIC interprets that phrase to limit the proviso's application to suits in which only investors, creditors, stockholders, or the institution are parties.

Such a reading is not consistent with the interpretation that this court has given the proviso under § 1819 Fourth. If, as in this case, the receiver, who represents the institution, brings suit to enforce the rights of the institution and the resolution of those rights is the only question in the suit, then the suit "involves only the rights or obligations of . . . such institution," regardless of who the defendants are. In *Federal Deposit Insurance Corporation v. Braemoor Associates,* 686 F.2d 550 (7th Cir.1982), *cert. denied,* 461 U.S. 927, 103 S.Ct. 2086, 77 L.Ed.2d 297 (1983), the FDIC brought a suit against a joint venture and five individuals to receive monies siphoned away from the bank by its president through illegal loans in violation of his fiduciary duties. We held that the proviso was not ap-

plicable because the suit was not brought by the FDIC in its capacity as receiver, as required by the proviso. The FDIC, having sold the rights to the causes of action to itself for value, had filed suit as the holder of those rights. We stated, however, "Had the FDIC brought this suit—a suit to impose a constructive trust by reason of Paul Bere's violation of his fiduciary obligations under state law—in its capacity as receiver, the proviso, quoted above, to the grant of federal jurisiction in section 1819 Fourth would have prevented the FDIC from maintaining the suit in federal court." *Id.*, at 562.

We held that the proviso applied to a suit brought by the FDIC as receiver to collect on a debt. *Federal Deposit Insurance Corporation v. Elefant,* 790 F.2d 661 (7th Cir.1986). The defendants were not investors, creditors, and stockholders of the institution or the institution itself. *Accord, Federal Deposit Insurance Corporation v. Sumner Financial Corporation*, 602 F.2d 670 (5th Cir.1979) (proviso applies to suit brought by the FDIC as receiver against various individuals and another corporation alleging conversion through illegal loans); *Federal Deposit Insurance Corporation v. La Rambla Shopping Center, Inc.*, 791 F.2d 215, 220 (1st Cir.1986) (proviso applies to a suit between a creditor and the FDIC acting as receiver); *In re F & T Contractors, Inc.*, 718 F.2d 171 (6th Cir. 1983).

The FSLIC relies on *North Mississippi Savings & Loan Association v. Hudspeth,* 756 F.2d 1096 (5th Cir.1985), *cert. denied,* 474 U.S. 1054, 106 S.Ct. 790, 88 L.Ed.2d 768 (1986). *Hudspeth* is inapposite. In that case, North Mississippi Savings & Loan Association ("Old North"), a non-insured, state-chartered savings and loan filed suit in state court for a declaratory judgment that its employment contract with Hudspeth, its president, was terminable.

Hudspeth filed a counterclaim for specific performance of the contract or damages. The FSLIC was appointed receiver of Old North and formed a new, federally-chartered savings and loan ("New North"), which took over most of the assets and liabilities of Old North. Hudspeth amended the counterclaim to join New North. New North and the FSLIC, acting on behalf of Old North, removed the action to federal court under § 1730(k)(1). The Fifth Circuit held that the proviso did not apply to the case: "Hudspeth [] sued and demanded damages from New North, a federally-chartered institution that was neither an investor, creditor, nor stockholder of Old North." In *Hudspeth*, unlike this case, *Braemoor*, and *Elefant*, resolution of the rights and obligations of the parties listed in the proviso would not settle the case; thus the case involved more than those rights and obligations.

The FSLIC also argues that the proviso does not apply because of the involvement of federal law in the case. The proviso by its terms applies only to a case that "involves only the rights or obligations of investors, creditors, stockholders, and such institution *under State law.*" (emphasis added). The cause of action in this case is under state law for breach of fiduciary duties. The principal way federal law enters into the case is by reference in Illinois law. The Illinois Savings and Loan Act, Ill.Rev.Stat., Ch. 17, pars. 3021, 3042, required Manning to obtain insurance from the FSLIC or another approved insurer. The Act also permits a savings and loan to declare dividends after provision has been made to meet the reserve requirements of the insurer, which in the case of Manning was the FSLIC. The FSLIC alleges that both of the dividends declared by the directors in this case violated those requirements. Thus, the violation of the FSLIC reserve requirements was a violation of Illinois law that in

turn supports the claim of breach of fiduciary duty. The FSLIC also argues that the directors violated federal statutes and regulations regarding bookkeeping and reporting requirements and that these violations support the state law claim of breach of fiduciary duty.

The FSLIC further argues that the directors violated two federal criminal statutes. 18 U.S.C. § 1006 prohibits employees and officers of an insured savings and loan from making, with intent to defraud or deceive, "any false entry in any book, report or statement of or to any such institution." 18 U.S.C. [§ 657] applies to any such employee or officer who "willfully misapplies any moneys" of such an institution. As with the other federal statutes and regulations, the FSLIC does not suggest that these statutes provide a cause of action independent of the state law claim, rather the FSLIC suggests only that the violations of the statutes support that claim.

It is important to note that the proviso by its terms applies to a suit "which involves only the rights or obligations . . . under State law," not just to a suit "which involves only State law." The proviso is thus not limited to suits that do not involve federal law. The determination of the rights and obligations under state law of investors, creditors, stockholders, and the savings and loan in this heavily federally regulated area of the law could never be done without an eye on the relevant federal law. Every suit with the FSLIC as a party necessarily involves federal law.

The sort of argument that FSLIC makes here was rejected in *Hancock Financial Corporation v. Federal Savings and Loan Insurance Corporation,* 492 F.2d 1325 (9th Cir.1974). In that case, Hancock had filed suit against the FSLIC to enjoin it from selling certain assets. 12 U.S.C. § 1729(b)(5) required the FSLIC, acting as receiver, to liquidate the assets of the savings and loan "in an orderly

manner." Hancock alleged that the proposed sale violated that requirement. Hancock argued that because this allegation raised a question of federal law the proviso was inapplicable.

The court held that the proviso did apply, reasoning that such a construction would nullify the proviso. "In every case where the FSLIC acts as a receiver, it would have the duty to liquidate assets in an orderly manner, thereby raising a question of federal law and taking the case out of the exclusionary provision." *Id.* at 1328. Because § 1729(b)(5) provided no duties independent of the existing duties of a receiver, the suit was one that involved only the "rights or obligations . . . under state law."

In the present case, all the alleged violations of federal law are subsidiary questions to the ultimate question in this case: whether the directors, under state law, breached their fiduciary duties to Manning in declaring the two dividends. The resolution of that issue would be the resolution of the case. Thus, this is a suit that "involves only the rights or obligations of investors, creditors, stockholders, and such institution under State law." *Accord, Braemoor,* 686 F.2d at 552 (proviso applies to a suit to apply constructive trust by reason of president's violation of his fiduciary obligations under state law).

Finally, the FSLIC argues that proviso does not apply because in this case the FSLIC acts as a federally-appointed, not state-appointed, receiver. There is no basis in the statute or the legislative history for this distinction. The proviso by its terms applies broadly to suits "to which the Corporation is a party in its capacity as conservator, receiver, or other legal custodian. . . ." Furthermore, Congress showed within the proviso that it could make this distinction when it so intended: it speaks of "an in-

sured *State-chartered* institution." (emphasis added). We decline to read the proferred distinction into the statute.

IV

For the reasons stated, the order of the district court denying defendant's motion to dismiss for lack of subject matter jurisdiction is reversed and the case is remanded, with instructions to grant the defendant's motion to dismiss for lack of subject matter jurisdiction.[3]

REVERSED AND REMANDED.

[3] This opinion has been circulated among all judges of this court in regular active service pursuant to Circuit Rule 40(f). One judge favored rehearing en banc and all other judges did not favor a rehearing en banc on the question of overruling *Federal Savings and Loan Insurance Corporation v. Krueger*, 435 F.2d 633 (7th Cir.1970).

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 83 C 2997

FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, IN ITS CORPORATE CAPACITY AND AS RECEIVER FOR MANNING SAVINGS AND LOAN ASSOCIATION, PLAINTIFF

v.

HAROLD J. TICKTIN, ET AL., DEFENDANTS

[Filed Apr. 11, 1984]

MEMORANDUM OPINION AND ORDER

SUSAN GETZENDANNER, District Judge:

This action by the Federal Savings and Loan Insurance Corporation ("FSLIC") is before the court on the motion to dismiss for lack of subject matter jurisdiction and for failure to state a claim upon which relief may be granted of defendants Harold Ticktin, Joseph Ticktin, Judith Ticktin, William Heaton, Harold Brown, and Bruce Watters. Defendants Raymond Powers and Grace Church Company have not moved to dismiss.

In its complaint, the FSLIC purports to state claims on behalf of itself, in its corporate capacity with damages to flow to its corporate treasury, and on behalf of Manning Savings and Loan Association ("Manning"), the state association for which the FSLIC is the federally appointed Receiver. 12 U.S.C. §1729(c) (Supp. 1983). Its three-count complaint alleges violations of both federal and state law

and requests money damages. Defendants argue that the complaint states only state claims, rendering applicable a jurisdictional restriction contained in the Financial Institution's Supervisory Act of 1966, 12 U.S.C. § 1730(k)(1).

The complaint centers on the issuance of dividends to Manning's permanent reserve shareholders. Defendants are all permanent reserve shareholders and/or Manning directors, among them holding 98.937% of Manning's permanent reserve shares. Before February 3, 1983 Manning was an Illinois savings and loan assocation, the accounts of which were insured by the FSLIC pursuant to 12 U.S.C. § 1726. On that date, the Federal Home Loan Bank Board ("FHLBB") appointed the FSLIC as sole Receiver for Manning under 17 U.S.C. § 1729(c)(1)(B). Before that date, the FSLIC claimed that Manning's Board of Directors had violated regulations promulgated under the National Housing Act by allowing more than two members of the same immediate family to be directors. 12 C.F.R. § 563.33. On March 1, 1980, the Board allegedly voted to declare a cash dividend of $4 per share to be distributed to all permanent reserve shareholders. The FSLIC maintains that the payment of this dividend was "illegal in that Manning did not have sufficient net worth to pay a dividend of this magnitude under State or Federal law. The dividend exceeded by at least $314,717 the maximum dividend which could have been paid by Manning, given its net worth and reserves at the time." (Complaint ¶ 14.) On October 10, 1980, the Illinois Commissioner of Savings and Loan Associations issued a Formal Order determining that the March 1 dividend violated Illinois law and directing Manning's Board of Directors to recoup $314,717 of the dividend payments. While the order became final on September 14, 1981, the Board of Directors allegedly failed to recoup all or any portion of the dividend. (*Id.* at ¶ 15.)

The FSLIC issued a Notice of Charges and Hearing to Manning on November 12, 1981, alleging Manning violated 12 U.S.C. § 1726(b) and 12 C.F.R. § 563.13, namely, by failing to meet the net worth requirements of these provisions. On that same day, the FSLIC also issued a cease-and-desist order to Manning and its directors under 12 U.S.C. § 1730(f) (temporary cease-and-desist orders), which prohibited the paying of dividends on Manning's capital stock until the charges were dismissed or the cease-and-desist order became final. In response, Harold Ticktin and Manning filed a complaint in the United States District Court for injunctive relief against the FSLIC on December 7, 1981. On December 15, the court issued Ticktin's "temporary restraining order to modify FHLBB order of November 25, 1981," holding, inter alia, that the cease-and-desist order was modified so that Manning shall "pay no dividend on its capital stock, except in accordance with applicable state law. . . ." *Ticktin et al. v. FSLIC, et al.*, No. 81 C. 6808, Order (N.D.Ill. December 15, 1981).

On April 22, 1982, the FSLIC amended the Notice of Charges and Hearing to advise Manning and its directors that Manning had a negative net worth of a magnitude to render it over $2 million below its net worth requirement with monthly operating losses of about $300,000. (*id.* at ¶ 18.)

Notwithstanding this Notice, the Board of Directors met on May 3, 1982, and authorized the distribution of a dividend to the permanent reserve shareholders of Manning. According to the FSLIC, at that time "Manning did not have the reserves required under state and federal law and its total net worth was below the minimum level which FSLIC-insured institutions must maintain. Indeed, Manning was insolvent, having a negative net worth of more than $500,000 and falling short of its net worth requirement by more than $2 million." (*id.* at 20.)

In Count I, the FSLIC alleges that the Board of Directors, in issuing the first and second dividends, violated their fiduciary duties under the Illinois Savings and Loan Act. As relief, the FSLIC prays for relief in the amount of the value of the dividends, exemplary damages, costs, and such other relief as the court deems just and appropriate. In Count II, the FSLIC claims that shareholders have been unjustly enriched, entitling the FSLIC to restitution or damages in the amount of the dividends.

While Counts I and II purport to state claims under Illinois law, the FSLIC contends that the violation of federal regulations in part forms the basis for a finding that Illinois laws of fiduciary duties were violated. Count III alleges "Liability Under Federal Law." (*Id.* at p. 13.) There, the FSLIC alleges that several defendants breached their duties to Manning by causing it "to violate the temporary cease-and-desist order issued by the FSLIC on November 12, 1981, as modified by this court's order on December 15, 1981." (*Id.* at ¶17.) In addition, certain defendants violated federal law by, contrary to 12 C.F.R. § 571.7(b), putting themselves into a conflict of interest with the insured institution. By contributing to the dissipation of Manning's assets, these breaches of federal duty entitle the FSLIC, individually and as Receiver, to recover damages constituting the reasonable value of the dividends.

Subject Matter Jurisdiction

Defendants argue that the court has no subject-matter jurisdiction over the FSLIC's claims as Receiver. The FSLIC alleges that jurisdiction rests in part on the jurisdictional grant of §1730(k)(1). That section states in full:

> (k) Jurisdiction and Enforcement. (1) Notwithstanding any other provision of law, (A) the Corporation

> shall be deemed to be an agency of the United States within the meaning of section 451 of title 28 [of the United States Code]; (B) any civil action suit, or proceeding to which the Corporation shall be a party shall be deemed to arise under the laws of the United States, and the United States district courts shall have original jurisdiction thereof, without regard to the amount in controversy; and (C) the Corporation may, without bond or security, remove any such action, suit or proceeding from a State court to the United States district court for the district and division embracing the place where the same is pending by following any procedure for removal now or hereafter in effect: *Provided, That any action, suit, or proceeding to which the Corporation is a party in its legal capacity as conservator, receiver, or other legal custodian of any insured State-chartered institution and which involves only the rights or obligations of investors, creditors, stockholders, and such institution under State law shall not be deemed to arise under the laws of the United States.*

(Emphasis added.) This court has previously interpreted this section as

> providing that a suit in which the FSLIC is a party shall be deemed to arise under the laws of the United States if any one of the following factors is present: (1) the FSLIC is suing in its corporate capacity, (2) the suit involves the rights of others than Manning and its investors, creditors, and stockholders, and (3) the suit involves the rights of any party under federal law.

FSLIC v. I-Tex Energy Corp., et al., No. 83 C 3994, slip op. at 3 (N.D.Ill. January 9, 1984). If the present action falls outside of the proviso's scope, it becomes unnecessary to determine whether the proviso applies to this case.

Following the analysis of that opinion, the court finds the FSLIC's claims in its corporate capacity must be dismissed. The complaint contains no allegations of injury to the FSLIC separate from those to Manning, nor does it contain allegations of any scheme to deceive or otherwise injure the FSLIC. *See id.* at 4-7. Moreover, the suit does not involve the rights of others than the insured institution and its investors, creditors, and stockholders. That some defendants here are directors as well as stockholders does not persuade the court the action should be removed from the proviso's coverage, nor does the FSLIC so seriously argue. Hence, in order to establish subject matter jurisdiction over this case, the court must find either that the action "involves" rights under federal law or that the proviso is inapplicable in full to this action.

The FSLIC argues that "involves" should be broadly construed while defendants argue that it should be interpreted as coextensive with "arising under" as that term is defined in 28 U.S.C. § 1331. If defendant's interpretation of "involves" were correct, the FSLIC would have to allege a federal claim under which relief could be granted to Manning (or the FSLIC as its Receiver) based on federally created liability of defendants.

The court must therefore address whether "involves" should be construed more broadly than "arising under."[1] The court is persuaded by the FSLIC's argument that were the proviso to incorporate an "arising under" standard, it would render meaningless subprovision (B) and perhaps subprovision (A). In interpreting a statute, the court should strive to give effect and meaning to every term and provision. *United States v. Blasius*, 397 F.2d 203 (2d Cir.

[1] Jurisdiction over such a case would clearly be constitutionally proper. *See Osborn v. Bank of the United States*, 9 Wheat. 738 (1824). The court must determine whether it is empowered by Congress to hear it.

1968), *cert. denied*, 393 U.S. 1008 (1969). Following this rule of statutory construction, and given Congress' choice to use "involves" in the provision instead of "arising under," the court finds that if the action before it requires the interpretation of federal law, it falls outside of the proviso's scope.

While federal law and regulations govern whether Manning could have been placed under federal receivership, it is not clear that defendants plan to challenge the receivership, if indeed that are so empowered. In addition, the court has held that the FSLIC states no claims arising under federal law. The FSLIC contends, however, that

> These violations of federal law are included in Count I [state claim] on the theory that directors and officers of insured savings and loan associations have fiduciary duties under state law to conform their conduct and the conduct of the association to the requirements of federal regulations and orders, and in particular the requirements of injunctive orders issued by this Court.

(FSLIC's Memorandum in Opposition p. 20.) In this action, the FSLIC contends that the directors' actions violated federal law and exposed the institution to insolvency and federal receivership. These actions are among the unlawful transactions that directors' fiduciary duties prohibit them from conducting, and may be used to determine whether the directors violated their fiduciary duties to Manning. Under common law, breach of fiduciary duties requires proof of bad faith or illegal acts. The FSLIC contends that Manning's directors knew or recklessly disregarded that they were violating federal law and regulation in issuing the dividends made unlawful under both federal and state law. Evidence of their good faith in declaring the dividends would include evidence of

their alleged knowing violation of federal law. At least one defendant has answered the complaint and denied that Manning's assets were insufficient to allow the dividends under federal and state law. (Powers' Answer ¶ 11.) In addition, the accounting principles employed to determine such figures as "profits" and "total assets," at least the latter a relevant figure to determining a violation of Ill. Rev. Stat. ch. 17, § 3111(b), are to be determined under accounting principles in part recognized by the FHLBB for a federal association. *See* Ill. Rev. Stat. ch. 17, § 3027, 3030. Defendants' Memoranda in Support indicate that the accounting principles used by Manning in determining the issuance of dividends will be in dispute. Hence, federal law is "involved" in this action, as its violations and interpretations are central to determining violations of Illinois law. Because this action does not involve only state law, the proviso does not apply. The court need not determine whether the proviso is applicable to a suit by the FSLIC brought originally in federal court. *Compare Hancock Financial Corporation v. FSLIC,* 492 F.2d 1325 (9th Cir. 1974) (applies to suits brought originally in federal court to *FSLIC v. Krueger,* 435 F.2d 633, 635-636 (7th Cir. 1970) (applies only to removal actions); *Katin v. Apollo Savings,* 460 F.2d 422, 425 n.5 (7th Cir. 1971) (same).

Before considering the claims on the merits, the court must address defendants' contention that it should abstain from hearing this case. Defendants justify this contention by noting that an order to Manning to recoup the "illegal dividend" issued by the Illinois Commissioner of Savings and Loan Associations is the subject of state administrative review. The court finds that abstention is not appropriate in this case. *See Colorado River Water Conservation District v. United States,* 424 U.S. 800, 813-816, *reh'g denied,* 426 U.S. 912 (1976); *see also Krueger,* 435

F.2d at 636-637 (FSLIC need not abstain from bringing action against insolvent association's officers and directors; no interference with state administrative process in dissolution and liquidation of association).

Failure to State a Claim

Count I contains state law claims against Manning's directors in general and Harold and Joseph Ticktin in particular. Against the former, the FSLIC claims that the directors breached their fiduciary duties to Manning in issuing two illegal dividends. Set forth in the Illinois Savings and Loan Act, Ill. Rev. Stat. ch. 17, § 3079, these fiduciary duties were allegedly breached when the directors issued dividends in violation of Ill. Rev. Stat. ch. 17 §§ 3093, 3111, of the cease-and-desist order and its modifications, and of the formal order of the Illinois Savings and Loan Association Commissioner. In addition, the dividends were issued with knowledge or reckless disregard of the facts that Manning's net worth was too low under federal and state law to allow lawful issuance of the dividends. Relief from Harold and Joseph Ticktin is demanded for their participation in a transaction that resulted in a conflict of interest with their interests as permanent reserve shareholders, in violation of Ill. Rev. Stat. ch. 17, § 3079 and of 12 C.F.R. 571.7(b).

Defendants argue vigorously for a dismissal of this count, contending first that as directors they were acting in reliance on year end financial reports and accounting records based on generally accepted accounting principles. Hence, they could not have violated the Illinois statute or any fiduciary duties. This argument, as the FSLIC points out, raises a factual dispute that cannot be solved on this motion. Even were defendants to have been supported in their actions by accounting records, this alone would not

negate the allegations of bad faith and recklessness, for defendants could have known the reports were faulty or otherwise have known or discovered their course of action was unlawful.

Futhermore, according to defendants § 3079 only refers to directors' business transactions with the institution and not with the issuance of stock ratably to shareholders. In any case, defendants assert that § 3111, unlike parallel provisions in the Illinois Business Corporation Act, does not create a private claim on behalf of the institution and for liability against the directors. *See* Ill. Rev. Stat. ch. 32, § 157.42 (directors may be liable to corporation for unlawful actions).

The fiduciary duties required of directors of a savings and loan institution prohibit them from engaging in

> any business or transaction conducted on behalf of or involving the association which would result in a conflict of his own personal interest with those of the association which he serves, unless the business or transactions are conducted in good faith and aré honest, fair and reasonable to the association; a full disclosure of the business or transaction and the nature of the director's or officer's interest is made to the b oard of directors with any interested director abstaining, which approval shall be recorded in the minutes. Any profits inuring to the officer or director shall not be at the expense of the association. The business or transaction shall not represent a breach of the officer's or director's fiduciary duty and shall not be fraudulent or illegal.

The court agrees with defendants that § 3079 was not meant to apply to dividends issued ratably to shareholders. No cases support the FSLIC's theory. Furthermore, directors often own shares in the associations on the boards of which they serve. Many instances would

exist in which no directors could vote on the issuance of dividends, as § 3079 requires "interested" directors to abstain from voting. This conclusion obviates deciding whether a private claim may be implied under this section.

However, the FSLIC has an Illinois common law claim against defendants. Illinois has long allowed by statute an action against directors for knowing declaration of a dividend that renders the corporation insolvent or impairs it capital. *Aiken v. Insull,* 122 F.2d 746, 753 (7th Cir. 1941). The Illinois statute creating such liability has been described as codifying Illinois common law principles of director liability. *Aiken v. Peabody,* 168 F.2d 615, 617 (7th Cir. 1947).

Defendants have not shown nor argued that the Illinois Savings and Loan Act displaces the common law liability of directors in general for their breaches of fiduciary duty. Such a common law claim was the subject of the FSLIC's suit in *Katin.* Defendants have not shown, neither can the court find, evidence that the Illinois Savings and Loan Act, in effect before the decision in *Katin,* meant to displace the Illinois common law of fiduciary duties. The FSLIC clearly may recover these unlawfully dissipated assets from the directors, regardless of whether the ultimate recovery may be distributed to Manning's creditors. *See Katin,* 460 F.2d at 424 n.3 (FSLIC as state-appointed receiver for state association may recover unlawfully issued dividends; Illinois law of receivership allows such recovery of assets by receiver); 12 U.S.C. § 1729(b), (d); 12 C.F.R. § 569a.4, 569a.6(a)(3) (powers of FSLIC as receiver of state association).

In Count II, the FSLIC seeks to establish shareholder liability for unjust enrichment, naming as defendants Harold and Joseph Ticktin, Bruce Watters, and Grace Church Co. While the count incorporates previous allegations of the Ticktins' bad faith and intentional wrongdoing

in connection with the declaration of both dividends, there are no such allegations on the part of non-officer or director defendants Watters and Grace Church Co.

Defendants argue that no claim for unjust enrichment exists on behalf of Manning, as a corporation cannot be injured when dividends are issued ratably to its shareholders. The court rejects this argument, noting that in addition to lowering Manning's net worth and increasing its financial instability, the dividends exposed Manning to receivership and other forms of regulations and penalty. Defendants admit that a different case would be posed if creditors of Manning, rather than Manning itself, sought to recover the dividends Manning's capital reserve shareholders received.

However, the FSLIC as Receiver is empowered to represent Manning's creditors and depositors. For example, regulations dealing with receiverships of state insured institutions instruct

> The Corporation as Receiver, by operation of law and without any conveyance or other instrument, act or deed, shall succeed to (a) all the rights, titles, powers, and privileges of the insured institution, its members, holders of checking or savings accounts and non-withdrawable accounts, its officers and directors or any of them. . . .

12 C.F.R. § 569a.4. Moreover, discussing the powers and duties of the FSLIC as Receiver, the rules state

> The Receiver shall collect all obligations and money due such insured institution, and may:
>
> * * *
>
> (3) Institute, prosecute, maintain, defend, intervene and otherwise participate in any and all actions, suits, or other legal proceedings by and against the Receiver

> or such institution or in which the Receiver, such institution, or its *creditors* or members or any of them, shall have an interest, and in every way to represent such institution, its members and *creditors*. . . .

12 C.F.R. § 569a.6(a)(3) (emphasis added). The federal receiver may prosecute claims of creditors.

The court rejects defendants' assertion that the creditors have no action against the allegedly unjustly enriched shareholders. On the contrary, such an action may be maintained in Illinois. *Landers Frary & Clark v. Vischer Products Co.*, 201 F.2d 319 (7th Cir. 1953). The motive of the shareholders is considered irrelevant if the unlawful dividend impaired or endangered creditors' rights. *Id.* at 324; *see also In re Kettle Fried Chicken of America, Inc.*, 513 F.2d 807, 813 (6th Cir. 1975); *cf. Reilly v Segert*, 31 Ill. 2d 297, 201 N.E.2d 444 (1964) (same action authorized by Illinois Business Corporation Act). The motion to dismiss Count II for failure to state a claim is denied.

In Count III, the FSLIC first claims that defendants violated federal regulations and statutory provisions and thereby exposed themselves to liability under those rules. In specific, defendants are said to have violated 12 U.S.C. § 1726(b) and 12 C.F.R. § 563.13, by failing to meet the net worth requirements provided therein; 12 C.F.R. § 571.7(b), by placing themselves as directors in positions of conflict of interest between them and Manning; and 12 C.F.R. § 563.33, by committing the unsound practice of having more than two members of the same family on the board of directors at the same time.

The FSLIC and the FHLBB clearly have the power to enforce the statutory provisions and regulations that form the National Housing Act and its amendments. 12 C.F.R. § 500.4. However, because the FSLIC is suing as Manning's Receiver, it must show that Manning, or some other

party on whose behalf the FSLIC may sue, has a claim for damages under these regulations and provisions.[2]

The enforcement provisions of the National Housing Act are contained in § 1730. That provision provides for the FSLIC to terminate a state association's insured status upon its violation of certain rules and practices. § 1730(b). In addition, certain practices may give rise to the FSLIC's issuance of a Notice of Charges and Hearing, which may result in a permanent or temporary order to cease and desist the unlawful or unsound activity. § 1730(e), (f). These provisions allow the FSLIC to enforce the order through injunctive relief by the federal district courts, and allow as well the association or its agents to apply for injunctive relief against the cease-and-desist order. The FSLIC may also, upon specified notice and hearings, remove an officer or director from office or prohibit that person's future participation in running the affairs of the association. 12 U.S.C. § 1730(g), (h). Hearings to be conducted under these provisions are to take place in the

[2] The FSLIC has cited no cases, and the court has found none, that indicate that a private claim for money damages exists for the insolvent bank or its receiver. In *FSLIC v. Krueger, supra,* the Court noted that the FSLIC had brought a civil suit against an insolvent association's officers and directors for conspiracy to violate 12 C.F.R. § 563.9-3 and various criminal statutes applicable to the association, 18 U.S.C. §§ 657, 1006. The Court did not determine whether such a private claim, for conspiracy to violate these laws and standards, was permissible. 435 F.2d at 635. Similar facts exist in *Katin v. Apollo Savings, supra.* There, the FSLIC as receiver filed suits for money damages against an insolvent association's former officers and directors for conspiracy, fraud, and mismanagment in violation of the standards of conduct established in 18 U.S.C. 657, 1001, 1006, and 1008. 460 F.2d at 423. However, in *Katin,* it is unclear whether the FSLIC is suing directly under the federal law or incoporating such standards into state law. Both suits included claims under Illinois law. As the issue of implying a private claim was not raised in either case, the court must analyze the issue anew.

federal district courts, with review in the courts of appeals. 12 U.S.C. § 1730(j). The FSLIC may enforce orders it issues under (f) and (e) above by imposing civil monetary penalties for their violation. 12 U.S.C. § 1730(k)(3). The FSLIC may also carry out its statutory duties by placing state associations that are in default in receivership. In this case, the FSLIC had the exclusive authority to appoint itself as the receiver of Manning. 12 U.S.C. § 1729(c)(1)(B)(i). As such, the FSLIC has the powers of a receiver of a federal association as enumerated in 12 U.S.C. § 1729(b). Federal law therefore applies to the conduct of the receivership. Nowhere in § 1729 or § 1730 is it provided that the FSLIC has the authority as a receiver of a state association to sue its officers or directors for damages arising from their violation of federal law or regulation.

As the cited provisions do not expressly create a claim on behalf of state-insured institutions, the FSLIC must show that an implied action exists under them. A recent exposition of the test for implying a private claim under a federal statute is found in *Touche Ross & Co. v. Redington,* 442 U.S. 560 (1979). There the Court held that statutory provisions and their legislative history should be closely examined to determine the congressional intent behind them. Whether a private claim exists, in other words, is a question of statutory construction. 442 U.S. at 568. In construing the statute "[t]he ultimate question is one of congressional intent." *Id.* at 578. In *Touche Ross,* the Court moved away from the test in *Cort v. Ash,* 422 U.S. 66 (1975), in which the Court emphasized determining whether the claimant was in the class for whose special benefit the statute was enacted and whether a private claim would effectuate the statute's remedial purposes. *Touche Ross* explicitly stated that invocation of a statute's

remedial purposes "will not justify reading a provision 'more broadly than its language and the statutory scheme reasonably permit.' " *Id.* at 578.

With this test in mind, the court must determine whether the provisions and regulations stated above create a private claim for damages. As discussed above, none mentions that an insured institution may sue for damages under it. The legislative history is silent on whether the statutory provisions invoked create a private claim. Indeed, legislative history that does discuss the National Housing Act and its amendments tends to center on how to best enable the FSLIC and the FHLBB to enforce the statute's provisions through such vehicles as cease-and-desist orders, receiverships, and civil penalties. The history demonstrates an intent to grant federal financial supervisory agencies finer regulatory tools than the appointment of receivers, but is silent on private damage actions. *See* 1954 U.S.Code Cong. & Ad. News 2765-2766; 1978 U.S. Code Cong. & Ad. New 9288-9289. The statutes themselves impose a complex regulatory scheme on the FSLIC, the FHLBB, and the insured institutions, in which, under varying circumstances, the FSLIC is empowered to fine the institution or its directors, arrange for removal of directors, issue and enforce orders, and hold administrative hearings on statutory violations. The powers granted the FSLIC do not extend to minute regulation of day-to-day affairs of insured institutions, such as would be regulated by state law. Indeed, one court recently held that the FSLIC may not issue a cease-and-desist order for an insured institution's breach of contract with and misrepresentations to borrowers, as it was not sufficiently harmful to the institution as to constitute an unsafe and unsound practice that would jeopardize the institution's solvency. *Gulf Federal Savings and Loan Associa-*

tion of Jefferson Parish v. Federal Home Loan Bank Board, 651 F.2d 259 (5th Cir. 1981), *cert. denied* 458 U.S. 141 (1982) (federal association).

The statutory silences with respect to private claims, the complex regulatory scheme,[3] and the legislative history persuade the court that a private claim was not created by the cited provisions and their regulations.

The FSLIC argues further that defendants' violation of the cease-and-desist order of November 11, 1981 and the temporary injunction modifying that order form a basis on which a federal claim may be maintained. Defendants counter that the cease-and-desist order was withdrawn. The FSLIC does not dispute this assertion. However, neither the FSLIC nor defendants inform the court of when the cease-and-desist order was withdrawn. What is known is that the order was modified by a temporary

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[3] The case cited by the FSLIC for its proposition that the regulations create a private claim discuss regulation of federal savings and loan associations. *See Milberg v. Lawrence Cedarhurst Federal Savings and Loan Association,*496 F.2d 523 (2d Cir. 1974); *Murphy v. Colonial Federal Savings and Loan Association,* 388 F.2d 609 (2d Cir. 1967); *King v. Edwards,* 559 F.Supp. 75 (N.D. Ga. 1982); *Retting v. Arlington Heights Federal Savings and Loan Association,* 405 F.Supp. 819 (N.D.Ill. 1975); *City Federal Savings and Loan Association v. Crowley,* 393 F.Supp. 644, 651 (N.D.Ill 1975). These associations are governed by federal common and statutory law. And the provisions of and regulations under the Home Owners' Loan Act of 1933, 12 U.S.C. § 1461 et seq. ("HOLA"), do not generally apply to state associations. *First Southern Federal Savings & Loan v. First Southern Savings and Loan,* 614 F.2d 71, 73 (5th Cir. 1980). Hence, state laws governing fiduciary duties and director and shareholder liability, not to mention state statutes expressly regulating savings and loan associations, are only applicable if the court finds it appropriate to adopt such laws as consistent with federal policy objections in running federal savings and loan associations. It is logical that in those cases, the court would look to federal regulations concerning the conduct of these associations as having the force and effect of statutes.

restraining order of December 15, 1981 and that a new Notice of Charges and Hearing was issued on April 22, 1982. The second dividend was issued on May 3, 1982. The FSLIC seeks to base liability for this second dividend on defendants for their violation 1) of the cease-and-desist order, and 2) on the temporary restraining order.

As to the temporary restraining order, there is no allegation that it was still in effect almost five months later when its violation is alleged to have occurred. Even it it were, the FSLIC's action based upon it would be one for contempt of court. While such an action might enable the FSLIC to recover compensatory damages flowing from the violation, *Univeral City Studios, Inc. v. N.Y. Broadway International Corp.*, 705 F.2d 94, 96 (2d Cir. 1983) (injunction); *Vuitton et Fils S.A. v. Carousel Handbags*, 592 F.2d 126, 130 (2d Cir. 1979), the FSLIC has not here alleged contempt of court. The court is hesitant to interpret a plaintiff's complaint otherwise silent on the issue, as one for contempt. The FSLIC has not stated a federal claim based on the violation of the temporary restraining order.

As to the violation of the cease-and-desist order, the FSLIC had several statutory remedies. Under § 1730(f)(3), the FSLIC is empowered to seek enforcement of a cease-and-desist order in a federal district court. And, under § 1730(k)(2), the FSLIC may petition a federal district court for an injunction to enforce any "effective and outstanding" "notice and order" of the FSLIC. Furthermore, § 1730(k)(3) allows the FSLIC to impose a daily civil penalty on an institution's directors for violation of an FSLIC "final order." This statutory provision for the enforcement of cease-and-desist orders convinces the court that a private claim for damages was not created on behalf of insured state institutions under the National

Housing Act and its amendments for violations of cease-and-desist orders short of one for contempt.

The motion to dismiss Count III is granted. As discussed above, it does not state a claim under federal law and must be dismissed.

Conclusion

Federal jurisdiction over the subject matter exists in this action. The motion to dismiss for failure to state a claim is granted as to Count III and denied as to Counts I and II.

It is so ordered.

/s/ SUSAN GETZENDANNER
Susan Getzendanner
United States District Judge

APRIL 11, 1984

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 85-1989

FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, IN ITS CORPORATE CAPACITY AND AS RECEIVER FOR MANNING SAVINGS AND LOAN ASSOCIATION,
PLAINTIFF-APPELLEE

v.

HAROLD J. TICKTIN, JOSEPH J. TICKTIN, WILLIAM HEATON, HAROLD BROWN, AND JUDITH TICKTIN,
DEFENDANTS-APPELLANTS

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

No. 83 C 2997

Judge SUSAN GETZENDANNER

Entered Nov. 2, 1987

JUDGMENT – ORAL ARGUMENT

Before: HARLINGTON WOOD, JR., Circuit Judge, Hon. KENNETH F. RIPPLE Circuit Judge, Hon. JESSE E. ESCHBACH, Senior Circuit Judge.

This cause was heard on the record from the United States District Court for the Northern District of Illinois,

Eastern Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, REVERSED, with costs, and the cause is REMANDED, with instructions, in accordance with the opinion of this Court filed this date.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 85-1989

FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, AS RECEIVER FOR MANNING SAVINGS AND LOAN ASSOCIATION,
PLAINTIFF-APPELLEE

v.

HAROLD J. TICKTIN, JOSEPH J. TICKTIN, WILLIAM HEATON, HAROLD BROWN, AND JUDITH TICKTIN,
DEFENDANTS-APPELLANTS

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

No. 83 C 2997

SUSAN GETZENDANNER, Judge

[Entered Dec. 14, 1987]

ORDER

Before: HARLINGTON WOOD, J, Circuit Judge, Hon. KENNETH F. RIPPLE, Circuit Judge, Hon. JESSE E. ESCHBACH, Senior Circuit Judge.

On consideration of the petition for rehearing and suggestion for rehearing *en banc* filed in the above-entitled

cause by plaintiff-appellee, no judge in active service has requested a vote thereon, and all judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

APPENDIX E

STATUTORY AND REGULATORY APPENDIX

12 U.S.C. 1725 provides in pertinent part:

Creation of Federal Savings and Loan Insurance Corporation

(a) Creation, operation, and offices

There is created a Federal Savings and Loan Insurance Corporation (hereinafter referred to as the "Corporation"), which shall insure the accounts of institutions eligible for insurance as hereinafter provided, and shall be under the direction of the Federal Home Loan Bank Board and operated by it under such bylaws, rules, and regulations as it may prescribe for carrying out the purposes of this subchapter. The principal office of the Corporation shall be in the District of Columbia.

* * * * *

(c) Powers

On June 27, 1934, the Corporation shall become a body corporate, and shall be an instrumentality of the United States, and as such shall have power—

(1) To adopt and use a corporate seal.

(2) To have succession until dissolved by Act of Congress.

(3) To make contracts.

(4) To sue and be sued, complain and defend, in any court of competent jurisdiction in the United States or its Territories or possessions or the Commonwealth of Puerto Rico, and may be served by serving a copy of process on any of its agents or any agent of the Federal Home Loan Bank Board and mailing a copy of such process by registered mail or by certified mail to the Corporation at Washington, District of Columbia.

* * * * *

12 U.S.C. (& Supp. IV) 1726(b) provides:

Application for insurance; accompanying agreement

Application for such insurance shall be made immediately by each Federal savings and loan association, and may be made at any time by other eligible institutions. Such applications shall be in such form as the Corporation shall prescribe, and shall contain an agreement (1) to pay the reasonable cost of such examinations as the Corporation shall deem necessary in connection with such insurance, and (2) if the insurance is granted, to permit and pay the cost of such examinations as in the judgment of the Corporaton may form time to time be necessary for its protection and the protection of other insured institutions, to permit the Corporation to have access to any information or report with respect to any examination made by any public regulatory authority and to furnish any additional information with respect thereto as the Corporation may require, and to pay the premium charges for insurance as hereinafter provided. Each applicant for such insurance shall also file with its application an agreement that during the period that the insurance is in force it will not make any loans beyond one hundred miles from its principal office, except (1) loans in the area beyond such one-hundred-mile limit in which it was operating prior to June 27, 1934, and (2) loans which are made pursuant to regulations of the Corporation: *Provided,* That such agreement shall further provide that any loan made beyond fifty miles form the applicant's principal office (and outside the territory in which it was operating on such date) shall also be subject to such regulations; will not, after it becomes an insured institution, issue securities which guarantee a definite return or which have a definite maturity except with the specific approval of the Corporation, or issue any securities the form of which has not been

approved by the Corporation; will not carry on any sales plan or practices, or any advertising, in violation of regulations to be made by the Corporation; and will provide adequate reserves in a form satisfactory to the Corporation, to be established in accordance with regulations made by the Corporation. As used in this subsection the term "reserves" shall, to such extent as the Corporation may provide, include capital stock and other items, including net worth certificates issued pursuant to section 1729(f) of this title, as defined by the Corporation. Mutual capital certificates, subordinate to the rights of holders of savings accounts, savings certificates, and the Corporation, shall be deemed to be reserves for the purposes of this subsection in accordance with rules and regulations prescribed by the Corporation. The Corporation shall provide in its rules and regulations for charging losses to mutual capital certificates, net worth certificates issued pursuant to section 1729(f) of this title, reserves, and other net worth accounts. In the event an insured institution fails to maintain the reserves required by this subchapter, no payment of dividends on such certificates shall be made except with the approval of the Corporation.

12 U.S.C. (& Supp. IV) 1729 provides in pertinent part:

Liquidation of insured institutions

(a) Availability of accounts; organization of new association

In order to facilitate the liquidation of insured institutions, the Corporation is authorized (1) to contract with any insured institution with respect to the making available of insured accounts to the insured members of any insured institution in default, or (2) to provide for the organization of a new Federal savings and loan association for such purpose subject to the approval of the Federal Home Loan Bank Board.

(b) Powers of Corporation on default of Federal Savings and Loan Associations

(1) In the event that a Federal association is in default, the Corporation shall be appointed as conservator or receiver and as such—

(A) is authorized—

(i) to take over the assets of and operate such association;

(ii) to take such action as may be necessary to put it in a sound solvent condition;

(iii) to merge it with another insured institution;

(iv) to organize a new Federal association to take over its assets;

(v) to proceed to liquidate its assets in an orderly manner; or

(vi) to make such other disposition of the matter as it deems appropriate;

whichever it deems to be in the best interest of the association, its savers, and the Corporation; and

(B) shall pay all valid credit obligations of the association.

(2) The [C]orporation shall pay insurance as provided in section 1728 of this title. The surrender and transfer to the Corporaton of an insured account in any such association which is in default shall subrogate the Corporation with respect to such insured account, but shall not effect any right which the insured member may have in the uninsured portion on this account or any right which he may have to participate in the distribution of the net proceeds remaining from the disposition of the assets of such association.

(3) As used in this section, the term "Federal association" means a Federal savings and loan association or a Federal savings bank.

(c) Powers of Corporation and Federal Home Loan Bank Board on default of other institutions

(1)(A) In the event any insured institution other than a Federal association is in default, the Corporation shall have authority to act as conservator receiver, or other legal custodian of such insured institution, and the services of the Corporation are tendered to the court or other public authority having the power of appointment. If the Corporation is so appointed, it shall have the same powers and duties with respect to the insured institution in default as are conferred upon it under subsection (b) of this section with respect to Federal associations. If the Corporation is not so appointed it shall pay the insurance as provided in section 1728 of this title, and shall have power (1) to bid for the assets of the insured institution in default, (2) to negotiate for the merger of the insured institution or the transfer of its assets, or (3) to make any other disposition of the matter as it may deem in the best interests of all concerned.

(B)(i)(I) Notwithstanding any provision of the constitution or laws of any State, or of this section, in the event the Federal Home Loan Bank Board determines that any of the grounds specified in section 1464(d)(6)(A)(i), (ii), or (iii) of this title exist with respect to an insured institution, other than a Federal association, the Board shall have exclusive power and jurisdiction to appoint the Corporation as sole conservator or receiver of such institution.

(II) In such cases the [C]orporation shall have the same powers and duties with respect to insured institutions as are conferred upon it under subsection (b) of this section with respect to Federal associations.

(ii)(I) The authority conferred by this subparagraph shall not be exercised without the written approval of the State official having jurisdiction over the State-chartered insured institution that the grounds specified for such exercise exist.

(II) If such approval has not been received by the Board within 90 days of receipt of notice by the State that the Board has determined such grounds exist, and the Board has responded in writing to the State's written reasons, if any, for withholding approval, then the Board may proceed without State approval only by a unanimous vote of the Board. The corporation may also proceed without State approval if the Corporation has been appointed conservator, receiver, or other legal custodian pursuant to State law under subparagraph (A).

(2) In the event the Federal Home Loan Bank Board determines—

(A) that (i) a conservator, receiver, or other legal custodian (whether or not the Corporation) has been or is hereafter appointed for an insured institution which is not a Federal association other than by the Board (whether or not such institution is in default) and that the appointment of such conservator, receiver, or custodian, or any combination thereof, has been outstanding for a period of at least fifteen consecutive days, or (ii) an insured institution (other than a Federal association) has been closed by or under the laws of any State;

(B) that one or more of the grounds specified in paragraph (6)(A) of section 1464(d) of this title, existed with respect to such institution at the time a conservator, receiver, or other legal custodian was appointed, or at the time such institution was closed, or exists thereafter during the appointment of the conservator, receiver, or other legal custodian or while the institution is closed; and

(C) that one or more of the holders of withdrawable accounts in such institution is unable to obtain a withdrawal of his account, in whole or in part;

the Board shall have exclusive power and jurisdiction to appoint the Corporation as sole conservator or receiver for such institution. As used in this paragraph (2), the

term "State" includes the Commonwealth of Puerto Rico, the territories and possessions, and any place subject to the jurisdiction of the United States.

(3) In any case where the Corporation is appointed conservator or receiver of an insured institution pursuant to paragraph (1) or (2)–

(A) the provisions of section 1464(d) of this title shall be applicable in the same manner and to the same extent as if such institution were a Federal association with respect to which the Corporation had been appointed conservator or receiver under paragraph (6) thereof, and the provisions of paragraph (14) of said subsection (d) shall be applicable in the same manner and the same extent that they would be applicable if the insured institution were an institution referred to in the first sentence of said paragraph; and

(B) the Corporation shall have authority to liquidate such institution in an orderly manner or to make such other disposition of the matter as it deems to be in the best interests of the institution, its savers, and the Corporation.

(d) Additional powers of Corporation

In connection with the liquidation of insured institutions, the Corporation shall have power to carry on the business of and to collect all obligations to the insured institutions, to settle, compromise, or release claims in favor of or against the insured institutions, and to do all other things that may be necessary in connection therewith, subject only to the regulation of the Federal Home Loan Bank Baord, or, in cases where the Corporation has been appointed conservator, receiver, or legal custodian solely by a public authority having jurisdiction over the matter other than said Board, subject only to the regulation of such public authority.

* * * * *

(f) Assistance to thrift institutions

(1) The Corporation is authorized, in its sole discretion and upon such terms and conditions as the Corporation may prescribe, to make loans to, to make deposits in, to purchase the assets or securities of, to assume the liabilities of, or to make contributions to, any insured institution–

(A) if such action is taken to prevent the default of such insured institution;

(B) if, with respect to an insured institution in default, such action is taken to restore such insured institution in default to normal operation; or

(C) if, when severe financial conditions exist which threaten the stability of a significant number of insured institutions or of insured institutions possessing significant resources, such action is taken in order to lessen the risk to the Corporation posed by such insured institution under such threat of instability.

(2)(A) In order to facilitate a merger or consolidation of an insured institution described in subparagraph (B) with another insured institution or the sale of assets of such insured institution and the assumption of such insured institution's liabilities by another insured institution, the Corporation is authorized, in its sole discretion and upon such terms and conditions as the Corporation may prescribe–

(i) to purchase any such assets or assume any such liabilities;

(ii) to make loans or contributions to, or deposits in, or purchase the securities of, such other insured institution (which, for the purposes of this subparagraph, shall include a Federal savings bank insured by the Federal Deposit Insurance Corporation);

(iii) to guarantee such other insured institution (which, for the purposes of this subparagraph, shall include a Federal savings bank insured by the Federal Deposit Insurance Corporation) against loss by reason of such other insured institution's merging or consolidating with or assuming the liabilities and purchasing the assets of such insured institution; or

(iv) to take any combination of the actions referred to in clauses (i) through (iii).

(B) An insured institution described in this subparagraph—

(i) is an insured institution which is in default;

(ii) is an insured institution which, in the judgment of the Corporation is in danger of default; or

(iii) is an insured institution which, when severe financial conditions exist which threaten the stability of a significant number of insured institutions, or of insured institutions possessing significant financial resources, is determined by the Corporation, in its sole discretion, to require assistance under subparagraph (A) in order to lessen the risk to the Corporation posed by such insured institution under such threat of instability.

(3) The Corporation may provide any person acquiring control of, merging with, consolidating with or acquiring the assets of an insured institution under section 1730a(m) of this title with such financial assistance as it could provide an insured institution under this subsection.

(4)(A) No assistance shall be provided under paragraph (1), (2), or (3) of this subsection in an amount in excess of that amount which the Corporation determines to be reasonably necessary to save the cost of liquidating (including paying the insured accounts of) such insured institution, except that such restriction shall not apply in any case in which the Corporation determines that the con-

tinued operation of such insured institution is essential to provide adequate savings or home financing services in its community.

* * * * *

12 U.S.C. 1730(k)(l) provides:

Jurisdiction and enforcement

Notwithstanding any other provision of law, (A) the Corporation shall be deemed to be an agency of the United States within the meaning of section 451 of Title 28; (B) any civil action, suit, or proceeding to which the Corporation shall be a party shall be deemed to arise under the laws of the United States, and the United States district courts shall have original jurisdiction thereof, without regard to the amount in controversy; and (C) the Corporation may, without bond or security, remove any such action, suit, or proceeding from a State court to the United States district court for the district and division embracing the place where the same is pending by following any procedure for removal now or hereafter in effect: *Provided*, That any action, suit, or proceeding to which the Corporation is a party in its capacity as conservator, receiver, or other legal custodian of an insured State-chartered institution and which involves only the rights or obligations of investors, creditors, stockholders, and such institution under State law shall not be deemed to arise under the laws of the United States. No attachment or execution shall be issued against the Corporation or its property before final judgment in any action, suit, or proceeding in any court of any State or of the United States or any territory, or any other court.

12 U.S.C. 1819 provides in pertinent part:

Incorporation; powers; seal

Upon June 16, 1933, the Corporation shall become a body corporate and as such shall have power—

First. To adopt and use a corporate seal.

Second. To have succession until dissolved by an Act of Congress.

Third. To make contracts.

Fourth. To sue and be sued, complain and defend, in any court of law or equity, State or Federal. All suits of a civil nature at common law or in equity to which the Corporation shall be a party shall be deemed to arise under the laws of the United States, and the United States district courts shall have original jurisdiction thereof, without regard to the amount in controversy; and the Corporation may, without bond or security, remove any such action, suit, or proceeding from a State court to the United States district court for the district or division embracing the place where the same is pending by following any procedure for removal now or hereafter in effect, except that any such suit to which the Corporation is a party in its capacity as receiver of a State bank and which involves only the rights or obligations of depositors, creditors, stockholders, and such State bank under State law shall not be deemed to arise under the laws of the United States. No attachment or execution shall be issued against the Corporation or its property before final judgment in any suit, action, or proceeding in any State, county, municipal, or United States court. The Board of Directors shall designate an agent upon whom service of process may be made in any State, Territory, or jurisdiction in which any insured bank is located.

* * * * *

18 U.S.C. 657 provides in pertinent part:

Whoever, being an officer, agent or employee of or connected in any capacity with * * * any institution

the accounts of which are insured by the Federal Savings and Loan Insurance Corporation * * * embezzles, abstracts, purloins or willfully misapplies any moneys, funds, credits, securities or other things of value belonging to such institution, or pledged or otherwise intrusted to its care, shall be fined not more than $5,000 or imprisoned not more than five years, or both; but if the amount or value embezzled, abstracted, purloined or misapplied does not exceed $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both.

18 U.S.C. 1006 provides in pertinent part:

Whoever, being an officer, agent or employee of or connected in any capacity with * * * any institution the accounts of which are insured by the Federal Savings and Loan Insurance Corporation * * *, with intent to defraud any such institution or any other company, body politic or corporate, or any individual, or to deceive any officer, auditor, examiner or agent of any such institution or of department or agency of the United States, makes any false entry in any book, report or statement of or to any such institution, or without being duly authorized, draws any order or bill of exchange, makes any acceptance, or issues, puts forth or assigns any note, debenture, bond or other obligation, or draft, bill of exchange, mortgage, judgment, or decree, or, with intent to defraud the United States or any agency thereof or any corporation, institution, or association referred to in this section, participates or shares in or receives directly or indirectly any money, profit, property, or benefits through any transaction, loan, commission, contract, or any other act of any such corporation, institution, or association, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

28 U.S.C. 1345 states:

Except as otherwise provided by Act of Congress, the district courts shall have original jurisdiction of all civil actions, suits or proceedings commenced by the United States, or by any agency or officer thereof expressly authorized to sue by Act of Congress.

12 C.F.R. 563.13(a) and (b) provides:

Regulatory capital requirement.

(a) *Scope.* (1) This section sets forth the requirements for the maintenance by insured institutions of regulatory capital, as defined in § 561.13 of this subchapter. Compliance with the requirements of this section shall be considered to be compliance with the reserve requirements of section 403(b) of the National Housing Act (12 U.S.C. 1726(b)).

(2) Items previously credited to the predecessor Federal Insurance Reserve Account shall be designated "restricted retained earnings" in the list of items comprising the regulatory capital account, and shall be used only for absorption of losses. Items earmarked or otherwise designated but not credited to that Account may be designated as restricted retained earnings.

(b) *Minimum required amount.* Except as otherwise provided in this section, the minimum regulatory capital requirement for any calendar quarter (commencing with the quarter ending March 31, 1987) shall be an amount equal to the sum of an institution's liability component and contingency component minus its maturity matching credit. An institution shall not use the maturity matching credit to reduce its required amount of regulatory capital below 3 percent of total liabilities for the period from December 31, 1986, until December 31, 1989, or to reduce its required capital below 4 percent of total liabilities on or after January 1, 1990.

(1) *General definitions:* For purposes of this section:

(i) "Total liabilities" means total assets net of loans in process, specific reserves, and deferred credits other than deferred taxes, minus regulatory capital as defined in § 561.13 of this subchapter.

(ii) "Base liabilities" means the lower of an institution's level of total liabilities on January 1, 1987, (beginning of day) or the institution's total liabilities at the end of the quarter for which regulatory capital is being computed.

(iii) "Increased liabilities" means an institution's total liabilities in excess of its base liabilities.

(iv) "Liability component," except as otherwise provided in this section, means an amount of capital equal to

(A) For the period commencing January 1, 1987, and ending when an institution's liability factor reaches 6 percent, an institution's base liabilities amount plus its increased liabilities amount; and

(B) Thereafter, 6 percent of total liabilities.

(2) *Calculation of base liabilities amount.* (i) "Base liabilities amount. (i) "Base liabilities amount" means an amount of capital which equals the greater of

(A) An institution's base liabilities multiplied by the liability factor for a quarter, or

(B) An institution's base liabilities multiplied by its base ratio.

(ii) "1987 base factor" means the minimum required amount of net worth under the former net worth regulation (12 CFR 563.13(g)(2) (1986)). ("former net worth regulation") calculated as of December 31, 1986, excluding the contingency component and before reduction for qualifying balances. This is the institution's 1987 base factor under the former net worth regulation.

(iii) "Base ratio" means a percent derived from a ratio (A) with a numerator equal to an institution's 1987 base

factor; and (B) with a denominator equal to the institution's total liabilities as of December 31, 1986.

(iv) "April calculation" means a percentage of the aggregate annual rate of return on the aggregate average level of assets of all insured institutions collectively. The percentage used for insured institutions in the standard group is 75 percent. The percentage used for insured institutions in the lower group is 90 percent. The Board will calculate the industry's rate of return and the resulting calculations in April of each year based upon the data for the prior calendar year.

(v) "Liability factor" means the percentage rate in any given quarter applied to an institution's base liabilities at the end of that quarter to calculate its base liabilities amount for that quarter.

(A) Institutions with base ratios equal to 3 percent (the "standard group") shall have initial liability factors of 3 percent. This percentage will change each July 1 by one-half of the most recent April calculation for the standard group and will change by the same percentage the following January 1.

(B) Institutions with liability factors below 3 percent ("lower group") shall have initial liability factors equal to their base ratios. This percentage will increase each July 1 by the higher of one-half of the most recent April calculation for the lower group or 90 percent of the institution's own return on assets (data based on its most recent annual report) for the prior calendar year. This liability factor will increase by the same percentage on the following January 1. If for any quarter an institution's liability factor computed under this method exceeds the liability factor of the standard group (as published with the Board's April calculation), the institution shall from that time forward use the liability factor of the standard group.

(C) Institutions with base ratios exceeding 3 percent (the "higher group") shall have initial liability factors

equal to their base ratios. Such an institution's liability factor shall remain constant until that liability factor is exceeded by the standard group's liability factor (as published with the Board's April calculation). From that time forward, such an institution's liability factor shall be the standard group's liability factor.

(3) *Calculation of increased liabilities amount.* The "increased liabilities amount" means an amount of capital equal to 6 percent of an institution's total liabilities in excess of its base liabilities.

(4) *Calculation of contingency component*—(i) *Definitions.* The terms defined in this paragraph are used in determining the contingency component, but may also be used elsewhere in this section.

(A) "Fully phased-in requirement" means an amount of capital equal to 6 percent of total liabilities plus the contingency component minus the maturity matching credit.

(B) "Net fully phased-in requirement" means an amount of capital equal to 6 percent of total liabilities plus the incremental capital requirement on fixed reserve elements of the contingency component minus the maturity matching credit.

(C) "Fully phased-in institution" means an institution meeting its fully phased-in requirement.

(D) "Fixed reserve elements" means scheduled items, recourse liabilities, and standby letters of credit.

(E) "Variable reserve elements" means direct investments, land loans, and nonresidential construction loans.

(ii) *Calculation method.* Contingency component means the sum of:

(A) Two (2) percent of recourse liabilities (as that term is defined in § 561.8 of this subchapter) resulting from the sale of any loan;

(B) Twenty (20) percent of the institution's scheduled items (as that term is defined in § 561.15 of this subchapter);

(C) Subject to the provisions of paragraph (b)(4)(ii)(D) of this section,

(*1*) An amount equal to a percentage of the dollar amount of aggregate direct investment (as defined in § 563.9-8(b)(1) of this subchapter) made after June 30, 1986, determined as follows:

(*i*) For institutions that do not meet their capital requirement, calculated without reference to the variable reserve elements of the contingency component, 10 percent of all direct investments.

(*ii*) For institutions that meet their current capital requirements but whose capital is less than the greater of 6 percent of liabilities or the net fully phased-in requirement, 5 percent of direct investments that constitute up to and including 10 percent of assets, and 10 percent of all other direct investments in excess of 10 percent.

(*iii*) For institutions whose capital is at least equal to the greater of their net fully phased-in capital requirement or 6 percent of liabilities, 5 percent of direct investments that constitute between 10 percent and up to and including 20 percent of assets, and 10 percent of direct investments that constitute more than 20 percent of assets;

(D) For purposes of paragraph (b)(4)(ii)(C) of this section. "aggregate direct investment made after June 30, 1986,"

(*1*) Includes: (*i*) All direct investments made after June 30, 1986; and (*ii*) direct investments made on or before June 30, 1986, that were subject to an incremental capital requirement under the contingency factor of the former net worth regulation (12 CFR 563.13(g)(5)(iii)(1986));

(*2*) Does not include:

(*i*) Direct investments in portfolio on or before June 30, 1986, that were not subject to an incremental capital re-

quirement under the contingency factor of the former net-worth regulation (12 CFR 563.13(g)(5)(iii)(1986));

(*ii*) Direct investments to which an institution was legally committed on or before June 30, 1986; or

(*iii*) Real estate projects completed pursuant to definitive plans in existence on or before June 30, 1986; and

(*iv*) Investments made in any service corporation or operating subsidiary; *Provided*, That any direct investment made by such service corporation or operating subsidiary which if made by the parent would be included in the parent's contingency component shall be included in the total of such investments of the parent institution;

(E) Subject to the provisions of paragraph (b)(4)(ii)(E)(*2*) of this section,

(*1*) An amount equal to a percentage of the dollar amount of aggregate land loans made after June 30, 1986, determined as follows:

(*i*) For institutions that do not meet their capital requirements, calculated without reference to the variable reserve elements of the contingency component, 4 percent of all land loans.

(*ii*) For institutions that meet their current capital requirements but whose capital is less than the greater of 6 percent of liabilities or the net fully phased-in requirement, 2 percent of land loans constituting up to and including 10 percent of assets, and 4 percent of land loans above that amount.

(*iii*) For institutions whose capital is at least equal to the greater of their fully phased-in capital requirement or 6 percent of liabilities, 2 percent of land loans that constitute between 10 percent and up to and including 20 percent of assets, and 4 percent of land loans above that amount.

(*2*) For purposes of paragraph (b)(4)(ii)(E)(*1*) of this section, "aggregate land loans made after June 30, 1986," means all land loans made after that date, but does not include land loans in portfolio as of that date, or loans to which the institution was legally committed on or before that date;

(F) Subject to the provisions of paragraph (b)(4)(ii)(F)(2) of this section,

(*1*) An amount equal to a percentage of the dollar amount of aggregate non-residential construction loans made after June 30, 1986 determined as follows:

(*i*) For institutions that do not meet their capital requirements, calculated without reference to the variable reserve elements of the contingency component, 4 percent of all nonresidential construction loans.

(*ii*) For institutions that meet their current capital requirements but whose capital is less than the greater of 6 percent of liabilities or the net fully phased-in requirement, 2 percent of nonresidential construction loans constituting up to and including 10 percent of assets, and 4 percent of nonresidential construction loans above that amount.

(*iii*) For institutions whose capital is at least equal to the greater of their net fully phased-in capital requirement or 6 percent of liabilities, 2 percent of nonresidential construction loans that constitute between 10 percent and up to and including 20 percent of assets, and 4 percent of nonresidential construction loans above that amount.

(*2*) For the purposes of paragraph (b)(4)(ii)(F)(*1*) of this section, "aggregate nonresidental construction loans made after June 30, 1986," means all nonresidential construction loans made after that date, but not nonresidential construction loans in portfolio as of that date, or nonresidential construction loans to which the institution was legally committed on or before that date;

(G) Two (2) percent of all standby letters of credit.

(5) *Calculation of maturity matching credit.* The "maturity matching credit" means an amount up to 2 percent of total liabilities by which the minimum regulatory capital requirement imposed under paragraphs (b)(2), (b)(3), and (b)(4) of this section may be reduced based upon an institution's low interest rate risk exposure as reflected by the institution's 1 year and 3 year hedged gap.

(i) *Definitions.* (A) "Hedged gap" means the difference between the dollar value of assets maturing or repricing within a defined time period and the liabilities maturing or repricing during that time period, all divided by total assets. Data are adjusted to reflect anticipated prepayments and hedging activities.

(B) "One-year gap" means the cumulative hedged gap for liabilities and assets maturing or repricing within 1 year.

(C) "Three-year gap" means that cumulative hedged gap for liabilities and assets maturing or repricing within 3 years.

(ii) *Calculation of maturity matching credit.* (A) The minimum regulatory capital requirement imposed by this section shall be reduced by 1 percent of total liabilities for a 1-year gap with an absolute value equal to or less than 15 percent. The capital requirement for institutions with a 1-year gap with an absolute value greater than 15 percent but less than or equal to 25 percent will be reduced by an amount calculated as follows: [.02005 – (.067 × [The absolute value of Gap])] multiplied by total liabilities. No reduction will be made for a 1-year gap with an absolute value greater than 25 percent.

(B) The minimum regulatory capital requirement imposed by this section shall be reduced by 1 percent of total liabilities for a 3-year gap with an absolute value equal to

or less than 15 institutions with a 3-year gap with an absolute value greater than 15 percent but less than or equal to 25 percent will be reduced by an amount calculated as follows: [.02005 – (.067 × [the absolute value of Gap])] multiplied by total liabilities. No reduction will be made for a 3-year gap with an absolute value greater than 25 percent.

(C) The total amount of deductions allowed pursuant to this paragraph shall not reduce an institution's minimum regulatory capital requirement under this section below 3 percent of total liabilities for any period up to and including December 31, 1989; or below 4 percent of total liabilities on or after January 1, 1990.

(D) For purposes of determining its maturity matching credit, an institution may use the 1-year and 3-year gaps calculated by its internal systems or the cumulative hedged gap calculated by the institution's Federal Home Loan Bank. The gap will be calculated by the Bank or the institution based on the data in section H of the Quarterly Report filed with the Board by the institution 6 months prior to the Quarterly Report for which the institution is calculating its minimum regulatory capital requirements. If the institution's calculation of its cumulative hedged gap differs significantly from its Federal Home Loan Bank's calculation, the PSA may disallow the institution's calculation and rely on its own calculation of the institution's cumulative hedged gap.

(6) *Special requirements for de novo and certain other institutions*—(i) "*De novo* institutions" means an institution which filed with the appropriate Federal Home Loan Bank an application for insurance of accounts, a request for a commitment to insure accounts, or an application to organize a Federal association, that was not approved prior to December 2, 1983, and the business of which has not been conducted previously under any charter.

(ii) The minimum regulatory capital requirement for *de novo* institutions shall be an amount computed in accordance with the provisions of this section applicable to all institutions except that the liability factors of such institutions will differ from the requirement of other institutions. The liability factor of a *de novo* institution (except for a *de novo* institution whose *de novo* application was processed in accordance with § 571.6(a)(2), or a "*de novo*" institution with a liability related requirement of 5 percent on the effective date of the regulation) shall be 7 percent of its total liabilities from the date it commences operations through the last day of its first full fiscal year, and 6 percent of total liabilities thereafter. A *de novo* institution with a liability related capital requirement of 5 percent on the effective date of this regulation shall be treated the same as other institutions in the higher group. That is, its liability factor shall remain 5 percent until exceeded by the standard group's liability factor and shall thereafter equal the standard group's liability factor.

(iii) *De novo* institutions which elected to have their applications for insurance of accounts processed in accordance with the policy set forth in § 571.6(a)(2) of this subchapter, but that did not also qualify under § 571.6(a)(3), shall maintain a minimum amount of regulatory capital computed in accordance with the provisions of this section applicable to all institutions. However, the liability factor for such an institution shall be 7 percent of its total liabilities for the period from the date it commences operations through the last day of its third full fiscal year, and shall be 6 percent of total liabilities thereafter.

(iv) Institutions other than *de novo* institutions with current liability related capital requirements exceeding those for other institutions under their charters or agreements (including institutions formerly insured by the Federal

Deposit Insurance Corporation or by privately funded insurance systems) shall have liability factors equal to the higher of the liabilities related portion of their specifically mandated capital requirements or the liability factor of the standard group.

(7) *Mergers, consolidations, or purchases of assets and assumptions of liabilities.* (i) Except as provided elsewhere in this section, after any merger, consolidation, or purchase of assets and assumption of liabilities (referred to as a "merger" of the "merged" and "continuing" institutions), beginning in the quarter in which the merger becomes effective, the regulatory capital requirement of the continuing institution is computed immediately after the merger based on the combined assets, investments, base liabilities, and increased liabilities of the merged and continuing institutions. The liability factor of the continuing institution shall be a percent derived from a ratio.

(A) With a numerator equal to the combined base liability amounts of the institutions immediately before the merger and

(B) With a denominator equal to the combined base liabilities of the institutions. The continuing institution's maturity matching credit shall similarly be computed as a weighted average (using total liabilities) of the 1-year and 3-year gaps of the merged and continuing institutions.

(ii) For any acquisition of less than substantially all of the liabilities of an institution in which the selling institution continues in operation as a separate entity (including, but not limited to, branch acquisitions), the base liabilities of the acquiring institution beginning in the quarter in which the transaction becomes effective shall be the base liabilities of the acquiring institution calculated to include an amount equal to the liabilities so acquired, the institution shall apply its liability factor for the quarter to its in-

creased level of base liabilities acquired from the selling institution. The selling institution shall deduct the amount of liabilities sold from its base liabilities and shall apply its liability factor for the quarter to this reduced level of base liabilities.

(iii) The provisions of this paragraph (b)(7) of this section may be superseded by the Corporation if the Corporation determines that such consolidation, merger, or purchase of assets and assumption of liabilities (including, but not limited to, branch aquisitions) is instituted for supervisory purposes.

(8) *Calculation period and maintenance requirement.* An institution shall calculate its minimum regulatory capital requirement pursuant to this section as of the end of each calendar quarter commencing with the quarter ending March 31, 1987, and shall maintain regulatory capital in an amount not less than the minimum requirement so calculated from the end of the quarter for which the minimum requirement was calculated until the end of the next succeeding calendar quarter.

12 C.F.R. 563.33 provides:

Directors, officers, and employees.

(a) *Directors*—(1) *Requirements.* The composition of the board of directors of an insured institution must be in accordance with the following requirements:

(i) A majority of the directors must not be salaried officers or employees of the institution or of any subsidiary or (except in the case of an institution having 80% or more of any class of voting shares owned by a holding company) any holding company affiliate thereof.

(ii) Not more than two of the directors may be members of the same immediate family.

(iii) Not more than one director may be an attorney with a particular law firm.

(2) *Prospective application.* In the case of an institution whose board of directors does not conform with any requirement set forth in paragraph (a)(1) of this section as of October 5, 1983, this paragraph (a) shall not prohibit the uninterrupted service, including re-election and reappointment, of any person serving on the board of directors at that date.

(b) *Inconsistent conditions of insurance or agreements for operating policies.* Any insured institution which agrees in writing with the Corporation to comply with all of the guidelines set forth in paragraph (a) of this section need no longer comply with any present condition of insurance or provision of its agreement for operating policies concerning the composition of its board of directors or the employment of its officers.

(c) *Other employment.* No insured institution or subsidiary thereof shall permit any salaried officer or employee to work during the hours of his employment by such institution or subsidiary for any affiliated person of such institution unless such affiliated person compensates such institution or subsidiary for the time during which such officer or employee is engaged in such work.

12 C.F.R. 571.7 provides:

Conflicts of interest.

(a) The Board has a paramount interest in the prevention and elimination of practices and conditions which adversely affect: The interests of members in insured institutions; the soundness of such institutions; the provision of economical home financing for the Nation; and the accomplishment of the other purposes of title IV of the National Housing Act, as amended.

(b) Among the practices and conditions which have such adverse effects are conflicts between the accomplishment of the purposes of title IV set forth in paragraph (a) of this section and the personal financial interests of directors, officers, and other affiliated persons of insured institutions. Conflicts of this type which have demonstrably resulted in such adverse effects are considered by the Board to be inherently unsafe and unsound practices and conditions. The board accordingly holds that each director, officer, or other affiliated person of an insured institution has a fundamental duty to avoid placing himself in a position which creates, or which leads to or could lead to, a conflict of interest or appearance of a conflict of interest having such adverse effects.

(c) The Board recognizes that it is impossible to define every practice or condition which falls within the broad concept of objectionable conflict of interest. The Board has nevertheless issued various regulations to limit or prohibit certain conflicts of interest to reflect its conclusion that the conflicts so limits or prohibited are especially inimical to the accomplishment of the purposes of title IV. However, the omission by the Board to specifically limit or prohibit other conflicts of interest should not be interpreted as tacit approval thereof. The Board or its Supervisory Agents will continue to examine those conflict-of-interest situations which are not specifically limited or prohibited under the regulations and will, when circumstances so warrant, take appropriate action to prevent, circumscribe or eliminate such situations.

Ill. Ann. Stat. ch. 17, para. 3042 (Smith-Hurd 1981) (recodified without material change in Ill. Ann. Stat. ch. 17, para. 3301-11 (Smith-Hurd Supp. 1987)) provided in pertinent part:

> § 1-11. Insurance of withdrawable capital. An association operating under this Act shall, before June 30, 1975, obtain and maintain insurance of the association's withdrawable capital by an insurance corporation as defined in this Act [FSLIC, see para. 3021] or such other insurer as may be approved by the Illinois Department of Insurance, in an amount at least equal to that provided by the Federal Savings and Loan Insurance Corporation. * * *.

Ill. Ann. Stat. ch. 17, para. 3093 (Smith-Hurd 1981) (recodified without material change in Ill. Ann. Stat. ch. 17, para. 3304-3 (Smith-Hurd Supp. 1987)) provided:

> § 4-3.Permanent Reserve Shares—Nature. Permanent reserve shares shall constitute a secondary reserve out of which losses shall be paid after all other available reserves have been exhausted, and shall have a par value of one dollar ($1.00) each or such greater amount as the articles of incorporation may prescribe; and such shares shall be:
>
> (a) Nonwithdrawable, except as provided in the section of this article on Retirement or Reduction of Permanent Reserve Capital,[1] until all liabilities of the association have been satisfied in full, including payment of the withdrawal value of all other types or classes of capital.
>
> (b) Entitled to dividends only as provided in the section of this article concerning Dividends.[2]
>
> (c) Issued only upon cash payment of not less than the par value thereof, or in exchange for the

withdrawal value of withdrawal capital accounts, or in connection with a merger, sale of all assets, or conversion, or as stock dividends as provided in the section of this article on Dividends.

Ill. Ann. Stat. ch. 17, para. 3110 (Smith-Hurd 1981) (recodified without material change in Ill. Ann. Stat. ch. 17, para. 3304-6 (Smith-Hurd Supp. 1987)) provided in pertinent part:

§ 4-19. Reserves. (a) Each association shall have a contingent reserve to which the board of directors shall allocate such portion of the association's profits as the board may determine; except that whenever the total amount of such reserve together with special reserves for losses and the insurance reserve of an insured association is less than 7½% of the aggregate withdrawal value of the association's withdrawable capital accounts, the allocation to such contingent, special reserve or the insurance reserve of an insured association upon each apportionment of profits shall total not less than 10% of the profits being apportioned, or such lesser portion as will increase the aggregate of such reserves to the required total amount. In lieu of the requirements specifically set forth in the preceding sentence, an insured association may make such allocations to the reserves as may from time to time be required by the insurance corporation.

(b) The board of directors may establish and maintain such special reservese as they may deem advisable, to provide for losses or liabilities; the contingent reserve, or any of such special reserves, may be designated as the insurance reserve for an insured association, or transfers from such reserves in whole or in part may be made to the issuance reserve; and losses may be charged to such reserves as the board of directors may determine.

* * * * *

Ill. Ann. Stat. ch. 17, para 3111(b) (Smith-Hurd 1981) (recodified without material change in Ill. Ann. Stat. ch. 17, para. 3304-17(b) (Smith-Hurd Supp. 1987)) provided:

(b) However, the declaration of dividends on capital shall be subject to the following restrictions:

(1) No dividends may be declared when the total amount of the contingent reserve is less than that required by section 4-19 of this Act,[1] unless the allocation provided by that section has been made.

(2) Cash dividends may be declared annually on permanent reserve shares after payment or provision has been made for all expenses, losses, required reserves and dividends on withdrawable capital. A stock dividend may be declared out of undivided profits at any time.

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OPPOSITION

BRIEF

(2)

87 No. 1865

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1987

FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION AS RECEIVER FOR MANNING SAVINGS AND LOAN ASSOCIATION, PETITIONER

V.

HAROLD J. TICKTIN, JOSEPH J. TICKTIN, WILLIAM HEATON, HAROLD BROWN, AND JUDITH TICKTIN

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

The well reasoned opinion of the court of appeals addressed persuasively the arguments now raised in the Petition for Certiorari, making unnecessary more than a brief response thereto.

1. Petitioner's principal argument and the only one for which it cites authority requires a strained construction of the proviso in 12 U.S.C. 1730(k)(1), by assuming that it was intended for "persons who have claims on the assets of the failed institution, not cases involving claims the receiver has against outsiders." Nothing in the statute or its legislative history justifies such assumption. A more likely explanation is the desire of Congress to protect the district courts from the flood of claims acquired by the receiver in the takeover of the notes and mortgages held by the failed institution.[1] Under Petitioner's interpretation of the proviso, the district courts would be flooded with cases against the multitudinous debtors under said notes and mortgagors.

Clearly, the rights or obligation mentioned in the proviso are those represented by the receiver. As stated by the court of appeals, if the receiver sues to enforce the rights of the institution and the resolution of those rights is the only question in the suit, then the suit involves only the rights of such institution. (Petition, p. 13a). Of course, the corollary of

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1 Similarly, 28 U.S.C. 1349, which bars federal jurisdiction for actions by or against federal corporations unless more than one-half of the stock is owned by the United States was enacted to stem a flood of litigation in the district courts. *Murphy v. Colonial Federal Savings and Loan Association*, 338 F.2d 609, 612 (2nd Cir. 1967)

every right is the obligation of the adverse party, but the provision is not concerned with the rights and obligations of the adverse party. Directors are not mentioned in the proviso because the receiver would not normally represent the directors.

The four decisions cited by Petitioner do not present a conflict within the meaning of Supreme Court Rule 17, and Petitioner itself concedes that they are reconcilable. (Petitioner, p. 21).

Petitioner relies upon some dicta in *Andrew D. Taylor Trust v. Security Trust Federal Savings and Loan Association*, 844 F.2d 337 (6th Cir. 1988). In that case, the claim was assigned to, and judgment affirmed in favor of, FSLIC in its corporate capacity, so that the proviso was not involved at all.

The cases cited by Petitioner fail to support its position that the presence of the directors as adverse parties in this case take the case out of the proviso, but actually support the Seventh Circuit Court of Appeals. In the cases cited by Petitioner the court refrained from holding that the presence of an adverse party made the proviso inapplicable. In each of said cases the court relied upon the presence of another party, and the presence of an adverse party, although a non-proviso party, was completely ignored. For example, in *American National Bank v. FDIC*, 710 F.2d 1528, 1533 n. 5 (11th Cir. 1983) the interest of SFC, a party adverse to FDIC in the interpleaded funds, was certainly greater than that of the Bank, as stakeholder of the funds, yet; the court relied upon the presence of the Bank to find jurisdiction instead of SFC, the adverse party.

Significantly, two of petitioner's cases were decided by courts of appeal which had previously stated or held that the proviso may bar jurisdiction, although in the cases before them the adverse party was a non-proviso party; yet, the prior

decisions were not overruled or even discussed. See *FDIC v. Ashley*, 585 F.2d 157, 159 (6th Cir. 1978) and *FDIC v. Sumner Financial Corp.*, 602 F.2d 670 (5th Cir. 1979).[2]

True, these cases involved the proviso in 12 U.S.C. 1819; however, it is substantially similar to the proviso governing FSLIC.

From the context of Section 1730(k)(1), it appears that the proviso is concerned with the rights and obligations represented by FSLIC as receiver, rather than with those of outside parties, whose character or capacity has no logical bearing on the applicability of the proviso. Obviously, every right of the receiver implies a corresponding obligation of the adverse party, but the determination of the receiver's right terminates the controversy, and such determination is all that is involved in the suit, unless there is a co-party with the receiver as in the cases cited by Petitioner.

2. Petitioner's second argument is that the defendants were alleged to have violated federal obligations. However, Petitioner does not show that the plaintiff's claim is not one "under State law." It seeks to find significance in that the term "arising under" is not expressed; however, "under" means "arising under" or "existing under." There is no difference in meaning.

If there were any doubt as to the meaning of "under State law," such doubt would be dispelled by the legislative history of 12 U.S.C. 1819, enacted in 1935, where the term was first introduced. Senate Report 1007, 74th Cong., 1st Sess. 5, states:

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2 Petitioner impliedly concedes that the holding in *Sumner Financial Corp* is contrary to its position. (Petition, p. 21 n. 28).

> It is provided that any suit to which the Corporation is a party in its capacity as receiver of a State bank and which involves only rights to be determined according to State laws shall not be deemed to arise under the laws of the United States. (Emphasis supplied). (Petition, p. 11 n. 13.).

The term, "under State law" was thereafter borrowed from the FDIC statute and introduced into the FSLIC statute by the Financial Institutions Supervisory Act of 1966. It cannot be denied that "according to State laws" means what it plainly says and that the involvement of federal law is immaterial.

The term "arising under" in 28 U.S.C. 1331 and 1337 excludes a State claim even though federal law is involved. It refers to "a dispute or controversy respecting the validity, construction or effect of such a [federal] law, upon determination of which the result depends." *Shulthis v. McDougal*, 225 U.S. 561, 569 (1912), "Not every question of federal law emerging in a suit is proof that a federal law is the basis of the suit." *Gully v. First National Bank*, 299 U.S. 109 (1936).

The court of appeals concluded that the alleged violations of federal law in this case do not provide a cause of action independent of the state law claim but only support the state claim for breach of fiduciary duty. (Petition, p. 16a). Petitioner does not dispute this conclusion. Petitioner argues that cases involving the proper interpretation of federal law should not be excluded from federal jurisdiction. However, nothing in the present complaint suggests a controversy respecting the correct interpretation of any federal law, and the existence of a federal question must affirmatively appear from the allegations of the complaint. *Gully v. First National Bank*, 299 U.S. 109, 114 (1936); *Burgess v. Charlottesville Savings and Loan Association*, 477 F.2d 40, 43 (4th Cir. 1973).

It is also worth noting that none of the courts which have considered 12 U.S.C. 1730(k)(1) or the similar proviso in 12 U.S.C. 1819 has relied upon the involvement of federal law to take the case out of the proviso. For example, see *FDIC v. de Velez*, 678 F.2d 371 (1st Cir. 1982) (federal restrictions on the retirement of bank stock involved).

3. Petitioner's final argument is that jurisdiction is provided by 28 U.S.C. 1345 because this suit was commenced by FSLIC and subsection (A) says that FSLIC is an agency of the United States. This argument overlooks the fact that FDIC is also an agency;[3] yet, Petitioner does not contend that suits commenced by FDIC should not be governed by the restrictions of the proviso, nor have the FDIC cases so held. Clearly, the general grant of jurisdiction in Section 1345 is overridden by the specific language of the jurisdictional statutes governing FDIC and FSLIC.

Petitioner disputes that subsection (A) clarified the law because of the *Acron* litigation, pointing out that *Acron* had already determined FSLIC to be an agency of the United States. However, the Financial Institutions Supervisory Act of 1966, introducing Section 1730(k)(1) with its subsection (A), was drafted by the Administration and sent to Congress on March 29, 1966. See 1966 U.S. Code Cong. & Adminis. News, p. 3554. At that time the *Acron* appeal had not yet been decided, and the section was apparently retained in its original form as drafted by the Administration. It is also noteworthy that subsection (A) does not refer to Section 1345, the appropriate section to claim agency jurisdiction for FSLIC. Instead, it refers to Section 451, which is the section which was at issue in the *Acron* case.

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3 *FDIC v. Glickman*, 450 F.2d 416, 418 (9th Cir. 1971).

Petitioner's argument fails to take into account that the primary purpose of Section 1730(k)(1) was to grant federal jurisdiction for FSLIC in its corporate capacity. The proviso was a limitation on the broad grant of jurisdiction enacted in subsection (B). Although the proviso employs the expression, "shall not be deemed to arise under the laws of the United States," this is not an indication that jurisdiction may be found upon some other ground. That phrase was used because it was also used in subsection (B). See *FDIC v. Sumner Financial Corp.*, 602 F.2d 670, 678 (5th Cir. 1979), which states that this terminology does not negate the context which "strongly suggests that the proviso (in Section 1819) is to be read as stating an absolute limitation on federal jurisdiction. . . ." Notwithstanding Petitioner's argument, the fact remains that subsection (A) was to clarify, not to make law or to create any difference between the jurisdiction for the two agencies. See Senate Report 1482 (1966 U.S. Code Cong. & Adminis. News, p. 3550).

As a matter of policy it is readily apparent why Congress limited jurisdiction for suits by FSLIC in its capacity as receiver of a State-chartered institution, as it had done for suits by FDIC in its capacity as receiver of a State bank. The policy is amply expressed Senate Report 1482 (1966 U.S. Code Cong. & Adminis. News, p. 3538-39), which emphasizes Congressional desire not to interfere with State functions and responsibilities under our dual banking and dual savings and loan systems. Another reason probably influencing Congress was the fear of flooding the district courts with an avalanche of claims on the notes and mortgages in the portfolios of the failed institutions.

Petitioner states that pending cases might now be barred by statutes of limitations. The Illinois statute of limitations expressly provides for refiling after dismissal for lack of federal jurisdiction. See 1987 Illinois Revised Statutes, Chap. 110, sec. 13-217. While FSLIC may have some cases

which cannot be refiled, it is not clear that the eventual dollar recovery thereon would be great or that any grave financial hardship would result from denial of the Petition for Certiorari. On the other hand, to adopt Petitioner's interpretation of 12 U.S.C. 1730(k)(1) would overrule the Congressional plan for uniform jurisdiction for FDIC and FSLIC as well as its plan to support the functions and responsibilities of the States under our dual savings and loan system.

CONCLUSION

Respondents respectfully urge that the Petition for a writ of certiorari be denied.

Respectfully submitted.

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JOINT

APPENDIX

(3)

Supreme Court, U.S.
FILED
NOV 17 1988
JOSEPH F. SPANIOL, JR.

No. 87-1865

In the Supreme Court of the United States

OCTOBER TERM, 1988

FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, AS RECEIVER FOR MANNING SAVINGS AND LOAN ASSOCIATION, PETITIONER

v.

HAROLD J. TICKTIN, JOSEPH J. TICKTIN, WILLIAM HEATON, HAROLD BROWN, AND JUDITH TICKTIN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

JOINT APPENDIX

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PETITION FOR WRIT OF CERTIORARI FILED MAY 12, 1988
CERTIORARI GRANTED OCTOBER 3, 1988

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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES IN COURTS BELOW

May 2, 1983	Complaint filed and Summons issued.
August 10, 1983	Defendants Harold Ticktin, Joseph Ticktin, William Heaton, Harold Brown, Judith Ticktin and Bruce Watters filed motion to dismiss.
April 11, 1984	Federal District Court Order entered denying motion to dismiss.
May 2, 1984	Defendants filed motion to reconsider.
May 8, 1984	Federal District Court Order entered denying motion to reconsider.
June 20, 1984	Defendants filed motion for certification.
September 19, 1984	Federal District Court Order granting motion to certify prepared.
September 24, 1984	Federal District Court Order vacating Opinion of September 19, 1984.
February 6, 1985	Federal District Court issued order denying FSLIC's request to reconsider September 19, 1984 Order.
March 15, 1985	Federal District Court reissued February 6, 1985 Order.
March 25, 1985	Defendants filed Petition for Permission to Appeal Pursuant to 28 U.S.C. § 1292(b).

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES IN COURTS BELOW – Continued

April 15, 1985	Federal District Court Order entered amending Certification Order of March 15, 1985.
May 23, 1985	Seventh Circuit Court of Appeals grants Petition for Permission to Appeal Pursuant to 28 U.S.C. § 1292(b).
November 2, 1987	Seventh Circuit Court of Appeals Opinion entered reversing and remanding for dismissal for lack of subject matter jurisdiction.
December 14, 1987	Petition for Rehearing and Suggestion for Rehearing *en banc* denied.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 83 C2997

FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, IN ITS CORPORATE CAPACITY AND AS RECEIVER FOR MANNING SAVINGS AND LOAN ASSOCIATION, PLAINTIFF

v.

HAROLD J. TICKTIN, JOSEPH J. TICKTIN, RAYMOND E. POWERS, WILLIAM HEATON, HAROLD BROWN, JUDITH TICKTIN, BRUCE WATTERS AND GRACE CHURCH CO., DEFENDANTS

(Jury Trial Demanded)

COMPLAINT

Plaintiff FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION (the "FSLIC"), in its corporate capacity and as Receiver for MANNING SAVINGS AND LOAN ASSOCIATION ("Manning"), for its complaint against Defendants HAROLD J. TICKTIN, JOSEPH J. TICKTIN, RAYMOND E. POWERS, WILLIAM HEATON, HAROLD BROWN, JUDITH TICKTIN, BRUCE WATTERS and GRACE CHURCH CO., alleges:

COUNT I

Parties

1. Prior to February 3, 1983, Manning was an Illinois savings and loan association whose accounts were insured by the FSLIC pursuant to 12 U.S.C. § 1726, with its principal place of business at 2854 W. Cermak Road, Chicago, Illinois.

2. On February 3, 1983, the Federal Home Loan Bank Board, pursuant to Section 406(c)(1)(B) of the National Housing Act, as added by the Garn-St. Germain Depository Institutions Act of 1982, Pub. L. No. 97-320, § 122(d), 96 Stat. 1469, 1482 (to be codified at 12 U.S.C. § 1729(c)(1)(B)), appointed the FSLIC as sole receiver for Manning (the "Receiver"). A copy of Federal Home Loan Bank Board Resolution No. 83-59, making the appointment, is attached hereto as Exhibit A. The FSLIC is a corporate agency of the United States.

3. Prior to February 3, 1983, Defendant Harold J. Ticktin was the President and Managing Officer of Manning, a director of Manning and a permanent reserve shareholder of Manning, holding 9.764 percent of the outstanding permanent reserve shares. Defendant Harold J. Ticktin controlled the Board of Directors of Manning because, contrary to the provision of 12 C.F.R. § 563.33 that not more than two directors of an insured institution should be members of the same immediate family, Harold Ticktin arranged to have members of his family dominate Manning's Board, as alleged herein.

4. Prior to October 1, 1982, Defendant Joseph J. Ticktin was a director and permanent reserve shareholder of Manning, holding 69.512 percent of the outstanding permanent reserve shares. Defendant Joseph J. Ticktin also was the appointed attorney of Manning, receiving a

monthly retainer of $1,250. He is the father of Harold Ticktin.

5. From February 25, 1982, through February 2, 1983, Defendant Judith Ticktin was a director of Manning. She is the wife of Harold Ticktin. Raymond E. Powers was a director of Manning prior to Judith Ticktin's election to the Board and was serving as a director in February and March, 1980.

6. Prior to February 3, 1983, Defendant Harold Brown was a director of Manning. He is the father of Judith Ticktin.

7. Prior to February 3, 1983, Defendant William Heaton was a director of Manning.

8. In May, 1982, Defendant Bruce Watters was a permanent reserve shareholder of Manning, holding 9.897 percent of the outstanding permanent reserve shares.

9. In May, 1982, Defendant Grace Church Co. was a permanent reserve shareholder of Manning, holding 9.764 percent of the outstanding permanent reserve shares.

Jurisdiction

10. The Court has original and pendent jurisdiction of this action pursuant to 12 U.S.C. § 1730(K)(1) and 28 U.S.C. §§ 1331, 1337 and 1345.

Nature of the Action

11. The FSLIC brings this action to recover the amount of two dividends which the directors of Manning distributed to Manning's permanent reserve shareholders on or about March 1, 1980 and May 3, 1982, respectively, when Manning had failed to maintain required reserves and when its total net worth was below the minimum level which FSLIC-insured institutions must maintain before paying a dividend.

The First Illegal Dividend

12. At a meeting of Manning's Board of Directors held on March 1, 1980, the Board voted unanimously to declare a cash dividend of $4 per share to be distributed to all permanent reserve shareholders of record on February 29, 1980.

13. Pursuant to the Board's vote, a total dividend of $419,924 was paid in two installments: $3 per share on March 1, 1980 and $1 per share on March 13, 1980.

14. The payment of this dividend was illegal in that Manning did not have sufficient net worth to pay a dividend of this magnitude under State or Federal law. The dividend exceeded by at least $314,717 the maximum dividend which could have been paid by Manning, given its net worth and reserves at the time.

15. On October 10, 1980, the Illinois Commissioner of Savings and Loan Associations issued a Formal Order, a copy of which is attached hereto as Exhibit B, determining that the March, 1980 dividend payments violated Illinois law and directing the Board of Directors of Manning to recoup $314,717 of the dividend payments. The Order was made final on September 14, 1981 by order of the Illinois Savings and Loan Board, a copy of which is attached hereto as Exhibit C. The Board of Directors failed to recoup all or any portion of the dividend and has continued to resist performance of their legal obligations through a State court administrative review proceeding.

The Cease and Desist Proceedings

16. On November 12, 1981, the FSLIC issued a Notice of Charges and Hearing to Manning and its directors, alleging that Manning was in violation of Section 403(b) of the National Housing Act, 12 U.S.C. § 1726(b), and Section 563.13 of the Insurance Regulations, 12

C.F.R. § 563.13, by failing to meet the net worth requirement provided therein. A copy of the Notice of Charges and Hearing is attached hereto as Exhibit D. On the same date, the FSLIC, pursuant to Section 407(f) of the National Housing Act, 12 U.S.C. § 1730(f), issued a temporary cease-and-desist order to Manning and its directors, *inter alia* prohibiting Manning from paying any dividends on its capital stock until the FSLIC dismissed the charges specified in the Notice of Charges and Hearing or until the cease-and-desist order became final. A copy of the cease-and-desist order is attached hereto as Exhibit E.

17. On December 7, 1981, Defendant Harold J. Ticktin and Manning filed a complaint for injunctive relief against the temporary cease-and-desist order in *Ticktin* v. *Federal Savings & Loan Insurance Corp.*, No. 81 C 6808, United States District Court for the Northern District of Illinois, Eastern Division. On December 15, 1981, the Court modified The Bank Board's order slightly, enjoining Manning from paying any dividends on its capital stock, except in accordance with applicable state law. The temporary cease and desist order, as modified, provided that, by agreement of the parties, it would remain in full force and effect until further order of the Court. A copy of the Court's order is attached hereto as Exhibit F.

18. On April 22, 1982, the FSLIC amended the Notice of Charges and Hearing to advise Manning and its directors that Manning had a negative net worth of $1,116,545 as of January 31, 1982, falling short of its net worth requirement by $2,404,034. The FSLIC further advised Manning and its directors that Manning was suffering operating losses of about $300,000 per month. A copy of the Amendment to the Notice of Charges and Hearing is attached hereto as Exhibit G.

The Second Illegal Dividend

19. On or about May 3, 1982, at a special meeting of Manning's board of directors, Defendants Harold J. Ticktin, Joseph J. Ticktin, William Heaton, Harold Brown and Judith Ticktin, acting as the Board of Directors of Manning, authorized distribution of a dividend to the permanent reserve shareholders of Manning. The dividend consisted of the stock of Manning Energy Corporation, a corporation reporting assets with a book value of $325,220, which was wholly owned by Manning at the time of the distribution and which was distributed to the permanent reserve shareholders in proportion to their percentage of stock in Manning. A copy of the minutes of the May 3, 1982, special meeting of the board of directors is attached hereto as Exhibit H.

20. At the time of the May 3, 1982, dividend, Manning did not have the reserves required under state and federal law and its total net worth was below the minimum level which FSLIC-insured institutions must maintain. Indeed, Manning was insolvent, having a negative net worth of more than $500,000 and falling short of its net worth requirement by more than $2 million.

The Directors' Liability

21. Defendants Harold J. Ticktin, Joseph J. Ticktin, Raymond E. Powers, Harold Brown and William Heaton, with respect to the First Illegal Dividend, and Harold J. Ticktin, Joseph J. Ticktin, Judith Ticktin, Harold Brown and William Heaton, with respect to the Second Illegal Dividend, breached their fiduciary duties to Manning as directors, as provided in Section 3-9 of the Illinois Savings and Loan Act, Ill. Rev. Stat. ch. 17, § 3079, in the following respects:

(a) They caused Manning to violate Sections 4-3 and 4-20 of the Illinois Savings and Loan Act, Ill. Rev. Stat. ch. 17, §§ 3093 and 3111, which prohibit the declaration of dividends on permanent reserve shares unless all required reserves have been maintained and provision for all expenses, losses and interest on deposit accounts has been made;

(b) They caused Manning to violate the temporary cease-and-desist order issued by the FSLIC on November 12, 1981, as modified by this Court's order on December 15, 1981;

(c) They dissipated the assets of Manning by granting the dividend with knowledge that Manning's required reserves and net worth were deficient or with reckless disregard of whether Manning's required reserves and net worth were deficient or not; and

(d) They failed to comply with the Formal Order of the Illinois Commissioner of Savings and Loan Associations with respect to the First Illegal Dividend.

22. Defendants Harold J. Ticktin and Joseph J. Ticktin also violated their fiduciary duties to Manning as directors by:

(a) Participating in a transaction involving Manning, which was not honest, fair or reasonable to Manning, which resulted in a conflict of their own personal interests as permanent reserve shareholders with those of Manning, in specific violation of Section 3-9 of the Illinois Savings and Loan Act, Ill. Rev. Stat. ch. 17, § 3079; and

(b) Placing themselves in a position which created a conflict of interest between themselves and Manning, in specific violation of Section 571.7(b) of the FSLIC Insurance Regulations, 12 C.F.R. § 571.7(b).

Liability of Harold J. Ticktin as Officer of Manning

23. For the reasons set forth in Paragraphs 21 and 22, above, Defendant Harold J. Ticktin also violated his fiduciary duties to Manning as its President and Managing Officer.

24. The conduct of Defendants Harold J. Ticktin, Joseph J. Ticktin, Raymond E. Powers, Harold Brown and William Heaton, in declaring the March, 1980 dividend, and of Defendants Harold J. Ticktin, Joseph J. Ticktin, Judith Ticktin, Harold Brown and William Heaton, in declaring the May 3, 1982, dividend was a constructive and an actual fraud on Manning, was reckless and was grossly negligent. This conduct was so extreme in its disregard of the Defendants' obligations as directors of an FSLIC-insured institution as to signify a conscious indifference to the rights of Manning, the interests of Manning's depositors and the interests of FSLIC as insurer of Manning's deposit accounts. The conduct renders the Defendants liable for exemplary damages in the amount of $100,000 each.

WHEREFORE, Plaintiff FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, in its corporate capacity and as the Receiver of MANNING SAVINGS AND LOAN ASSOCIATION, respectfully requests the Court to:

A. Enter judgment in its favor and against Defendants Harold J. Ticktin, Joseph J. Ticktin, Judith Ticktin, Harold Brown and William Heaton, jointly and severally, in the amount of $325,220 or, in the event that the Court determines that the value of the stock of Manning Energy Corporation was in excess of $325,220, in such greater amount;

B. Enter judgment in its favor and against Defendants Harold J. Ticktin, Joseph J. Ticktin, Raymond E. Powers, Harold Brown and William Heaton, jointly and severally, in the amount of $419,924 or such other amount by which the March, 1980 dividend payments are determined to have been illegal;

C. Award Plaintiff FSLIC $100,000 in exemplary damages as against each of the Defendants Harold J. Ticktin, Joseph J. Ticktin, Judith Ticktin, Harold Brown, William Heaton, and Raymond E. Powers;

D. Award Plaintiff FSLIC its costs in this action; and

E. Grant such other relief as the Court deems just and appropriate.

COUNT II

Incorporation By Reference. Plaintiff FSLIC realleges Paragraphs 1 through 22 of Count I of the Complaint as Paragraphs 1 through 22 of this Count.

The Shareholders' Liability

23. Defendants Harold J. Ticktin, Joseph J. Ticktin, Bruce Watters and Grace Church Co. (the "Shareholder Defendants") have each been unjustly enriched by receiving their respective portions of the $419,924 March, 1980 dividend and the stock of Manning Energy Corporation pursuant to the unlawful May 3, 1982, dividend.

24. The FSLIC is entitled, with respect to each of the Shareholder Defendants, to restitution of the March, 1980 dividend payments and any stock of Manning Energy Corporation retained by the defendant, any income received by the defendant in connection with the stock, and any consideration received by the defendant upon disposition of the stock; or, in the alternative, the FSLIC is entitled to judgment against each of the Shareholder Defendants in the amount of the March, 1980 dividend payments and the

reasonable value of the Manning Energy Corporation stock received by each of them, together with interest.

WHEREFORE, Plaintiff FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION in its corporate capacity and as the Receiver of MANNING SAVINGS AND LOAN ASSOCIATION, respectfully requests the Court:

A. To enter an order directing Defendants Harold J. Ticktin, Joseph J. Ticktin, Bruce Watters and Grace Church Co. to deliver to the FSLIC their respective portions of the $419,924 March, 1980 dividend and any stock of Manning Energy Corporation which they retain; to account for and deliver to the Receiver all income which they have received in connection with the stock of Manning Energy Corporation; and to account for and deliver to the Receiver any consideration which they have received upon disposition of the stock of Manning Energy Corporation; or, in the alternative,

B. To enter judgment in its favor against each of the Defendants Harold J. Ticktin, Joseph J. Ticktin, Bruce Watters and Grace Church Co. in the amount of their respective portions of the $419,924 March, 1980 dividend and the reasonable value of the Manning Energy Corporation stock received by each of them, together with interest;

C. To award Plaintiff FSLIC its costs in this action; and

D. To grant such other relief as the Court deems just and appropriate.

COUNT III

Incorporation By Reference. Plaintiff FSLIC realleges Paragraphs 1 through 11 and 16 through 20 of Count I of the Complaint as Paragraphs 1 through 16 of this Count.

Liability Under Federal Law.

17. Defendants Harold J. Ticktin, Joseph J. Ticktin, Judith Ticktin, Harold Brown and William Heaton breached their duties to Manning under federal law by causing Manning to violate the temporary cease-and-desist order issued by the FSLIC on November 12, 1981, as modified by this Court's order on December 15, 1981.

18. Defendants Harold J. Ticktin and Joseph J. Ticktin also violated their duties to Manning under federal law by violating Section 571.7(b) of the FSLIC Insurance Regulations, 12 C.F.R. § 571.7(b), which imposes a duty on each director and officer of an insured institution to avoid placing himself in a position which creates a conflict of interest between himself and the insured institution.

19. Each of these breaches of federal duties by Defendants Harold J. Ticktin, Joseph J. Ticktin, Judith Ticktin, Harold Brown and William Heaton substantially contributed to the dissipation of Manning's assets by the granting of the unlawful May 3, 1982, dividend, and the FSLIC, in its corporate capacity and as Receiver for Manning, is entitled to recover as damages from them, jointly and severally, the reasonable value of the dividend.

WHEREFORE, Plaintiff FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, in its corporate capacity and as Receiver for MANNING SAVINGS AND LOAN ASSOCIATION, respectfully requests the Court to enter judgment in its favor and against Defendants Harold J. Ticktin, Joseph J. Ticktin, Judith Ticktin, Harold Brown and William Heaton, jointly and severally, in the amount of $325,220, or in the event that the Court determines that the value of the stock of Manning Energy Corporation was in excess of $325,220, in such greater

amount, together with costs, and to grant such other relief as the Court deems just and appropriate.

DATED: May 2, 1983

/s/ WM. CARLISLE HERBERT

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Exhibit A

FEDERAL HOME LOAN BANK BOARD

To all to whom these presents shall come, Greeting:

I CERTIFY That hereto annexed are true copies of documents described below made from records of the Federal Home Loan Bank Board, which records are in the official custody of the Secretary to said Board and are on file in its offices at 1700 G Street, Northwest, Washington in the District of Columbia to wit:

Copy of Resolution No. 83-59, adopted by the Federal Home Loan Bank Board on February 3, 1983.

In testimony whereof, I, /s/ Wilvia Galbraith, Secretary to the Federal Home Loan Bank Board have hereunto caused the Seal of said Board to be affixed and my name subscribed hereto, in the District of Columbia, this 3rd day of February, 1983

/s/ Wilvia Galbraith
Asst. Secretary to the
Federal Home Loan Bank Board

FEDERAL HOME LOAN BANK BOARD

Appointment of Receiver for Manning

No. 83-59
Date: February 3, 1983

WHEREAS, The Federal Home Loan Bank Board ("Bank Board"), by section 406(c)(1)(B) of the National Housing Act ("NHA"), as added by the Garn-St Germain Depository Institutions Act of 1982, Pub. L. No. 97-320 ("1982 Act"), § 122(d), 96 Stat. 1469, 1482 (to be codified at 12 U.S.C. § 1729(c)(1)(B)), has exclusive power and jurisdiction to appoint the Federal Savings and Loan Insurance Corporation ("FSLIC") as sole receiver for an insured institution other than a federal association in the event that the Bank Board determines that any of the grounds specified in sections 5(d)(6)(A)(i), (ii), or (iii) of the Home Owners' Loan Act of 1933 ("HOLA") (12 U.S.C. § 1464(d)(6)(A)(i)-(iii) (1976)), exists with respect to such insured institution; and

WHEREAS, Manning Savings and Loan Association, Chicago, Illinois ("Manning"), is an institution incorporated under the laws of the State of Illinois, the accounts of which are insured by the FSLIC; and

WHEREAS, The Bank Board has considered a joint memorandum from its Office of the FSLIC, its Office of the General Counsel, and its Office of Examinations and Supervision, together with accompanying attachments and exhibits (a copy of which memorandum is in the Minute Exhibit File):

Grounds for Appointment

NOW, THEREFORE, IT IS RESOLVED, That the Bank Board hereby finds and determines that the grounds

specified in said section 5(d)(6)(A)(i), (ii), and (iii) of the HOLA exist with respect to Manning in that:

(1) Manning is insolvent, in that the assets of the association are less than its obligations to its creditors and others, including its accountholders; and

(2) Manning has incurred substantial dissipation of assets and earnings due to violations of law and regulations and to unsafe and unsound practices; and

(3) Manning is in an unsafe and unsound condition to transact business in that its continued operation is hazardous to the public and to its creditors and accountholders; and

Letter to State Commissioner

RESOLVED FURTHER, That the Secretary or an Assistant Secretary, be and hereby is authorized and directed to issue to the State of Illinois, addressed to the Savings and Loan Commissioner of the State of Illinois ("Commissioner"), a certified copy of this Resolution and materials summarizing the facts and circumstances underlying the determinations made in the preceding paragraph, in the form or substantially in the form of the letter attached to the Memorandum (a copy of which is in the Minute Exhibit File), *provided* that the final form of such letter has been approved by the Office of the General Counsel; and

FSLIC Appointed Sole Receiver

RESOLVED FURTHER, That the Bank Board, acting under the authority conferred upon it by said section 406(c)(1)(B)(i)(I) of the NHA, does hereby appoint the FSLIC sole receiver for Manning ("Receiver" effective immediately, provided that the written approval ("Approval"), referred to in section 406(c)(1)(B)(ii)(I), of the NHA (1982 Act, § 122(d), to be codified at 12 U.S.C.

§ 1729(c)(1)(B)(ii)(I)) of the Commissioner that one or more of the grounds specified in the first resolving paragraph of this Resolution exist with respect to Manning, has been given by the Commissioner and received by the Principal or other Supervisory Agent of the Federal Home Loan Bank Board, Chicago, Illinois ("Supervisory Agent"), or if such Approval has not been given and received, effective immediately upon its being given by the Commissioner and received by a Supervisory Agent, by any of the persons hereafter named in this Resolution as Special Representative of the Receiver, or by any of the following employees of the Office of General Counsel: Ronald Scott Taylor, Wilvia Galbraith, or Patricia Trask, *provided* that the form of such written Approval is satisfactory to the Office of the General Counsel; and

Powers and Duties of Receiver

RESOLVED FURTHER, That, pursuant to section 406(c)(1)(B), (c)(3), and (d) of the NHA (1982 Act, § 122(d), (f), and (g), 96 Stat. 1469, 1482-1483, to be codified at 12 U.S.C. § 1729(c)(1)(B), (c)(3), and (d)) the FSLIC as Receiver shall have and exercise all powers, rights, and privileges, and shall assume, perform, and discharge all duties, responsibilities, and obligations of a receiver for a federal savings and loan association as are accorded or imposed by, and subject to, applicable provisions of law and regulations and orders of the Bank Board, including, without limitation, section 5(d) of the HOLA (12 U.S.C. § 1464(d) (1976)) and section 406 of the NHA (12 U.S.C. § 1729 (1976 and Supp. IV 1980), as amended by the 1982 Act); and the FSLIC as Receiver shall have the authority and assume the duties of a receiver set forth in Parts 547 and 549 of the Rules and Regulations

for the Federal Savings and Loan System ("Federal Regulations") (12 C.F.R. §§ 547 and 549); and

RESOLVED FURTHER, That in addition to all powers and authority of a receiver provided for by law, regulation, and order, the Receiver is hereby authorized and empowered, and need not seek further approval from the Bank Board, to borrow money in such amounts from any source and in any manner as the Receiver requires to fulfill its duties as receiver, to execute, acknowledge, and deliver evidence of indebtedness therefor, and to secure repayment thereof by mortgage, pledge, assignment in trust, or hypothecation of any property of Manning; and

Implementing Authority

RESOLVING FURTHER, That the Director or Deputy Director, Office of the FSLIC, and the Director, Asset Management Division, Office of the FSLIC ("Director"), or any agent, employee, or attorney that may be designated by the Director, be and hereby is authorized to take such action as may be necessary or appropriate to carry out the obligations of the FSLIC as Receiver pursuant to the aforesaid appointment; and

RESOLVED FURTHER, That the FSLIC, in its corporate capacity and not as Receiver, is hereby authorized to make cash advances to the Receiver for the purpose of enabling the Receiver to perform its functions and duties, on such terms and conditions as the Director or Deputy Director, Office of the FSLIC, shall deem appropriate and said Director or Deputy Director, or any person designated by letter of them may execute such documents as may be necessary to make such advances or enter into collateral agreements; and

Special Representatives

RESOLVED FURTHER, That one or more persons shall be designated as "Special Representative" of the FSLIC as the Receiver; that such designated person or persons shall have power and authority to act in the name and on behalf of the FSLIC as the Receiver, including the authority, subject to the direction of the Director, to take prompt possession of the books, records, and property and assets of every kind and description of Manning; that initially Robert L. Pattullo, John S. Cain, and John W. Sears, shall each serve as a Special Representative; and that the Director may replace any such Special Representative at any time and may designate or replace and prescribe the responsibilites of such additional Special Representative(s) as he deems appropriate; and

RESOLVED FURTHER, That each Special Representative shall keep a record of his or her actions as Special Representative for the FSLIC as the Receiver, and shall report thereon from time to time as may be directed by the Director; and

Reports

RESOLVED FURTHER, That the Director shall from time to time report to the Bank Board with respect to actions taken pursuant to this resolution.

By the Federal Home Loan Bank Board

/s/ Wilvia Galbraith
Asst. Secretary

EXHIBIT B

STATE OF ILLINOIS

WILLIAM J. SCHILLING
COMMISSIONER

PHONE:
217-782-6181

OFFICE OF THE
SAVINGS AND LOAN COMMISSIONER
421 EAST CAPITOL AVENUE
SPRINGFIELD 62706

October 10, 1980

CERTIFIED MAIL

Board of Directors
Manning Savings and Loan Association
2854 West Cermak Road
Chicago, Illinois 60623

RE: Formal Order of the Commissioner Issued Pursuant to Section 7-2(c) of the Illinois Savings and Loan Act

Dear Directors:

At your board of directors meeting held March 1, 1980, you voted unanimously to declare a cash dividend of $4 per share to be distributed to all permanent reserve shareholders of record February 29, 1980.

The total dividend of $419,924 was paid in two installments; a $3 per share dividend on March 1, 1980, and a $1 per share apportionment on March 13, 1980. The dividend, which of necessity had to be based on association books and records as of December 31, 1979, was paid before the audit report was issued as of that date, (issued

June 24, 1980. On page 12 of that audit report, it was pointed out that the dividend was violative of supervisory regulations.

We have carefully reviewed your net worth position as of December 31, 1979 and have determined that as of that date, the association had excess net worth of $105,207, the maximum amount that could be paid out in stock dividends. The difference between this amount and the $419,924 dividend paid constitutes an unauthorized payment of $314,717.

The dividend payment is in violation of Section 4-20(b)(2) of the Illinois Savings and Loan Act, which states in relevant part; "Cash dividends may be declared annually on permanent reserve shares after payment or provision has been made for all expenses, losses, required reserves and dividends on withdrawable capital."

Neither management nor directorate has presented any acceptable rationale for this violation, which is a repeat of a similar violation occurring in 1979. The possibility that this infraction could cause insolvency or substantial dissipation of assets is supported by your operating statement as of August 31, 1980, reporting a deficit undivided profits balance of $123,554 and a net operating loss of $37,168.

By letter dated August 4, 1980, you were directed to have the excess cash dividend repaid to the association at once.

We have not received a positive response to any portion of our August 4, 1980 request.

Therefore, please be advised that pursuant to Section 7-2(c) of the Illinois Savings and Loan Act the Board of Directors of Manning is hereby directed to recoup $314,717 paid to Manning's permanent reserve share-

holders as a cash dividend in excess of funds properly available for dividend payment as heretofore outlined. Should you be unable to recover this excess dividend payment within 21 days of the date of this correspondence, then the Board of Directors is hereby ordered to personally, jointly, and severally pay the excess dividend to the association within thirty-five days of the receipt of this Order.

It is the opinion of this Office that the action of the Board of Directors in declaring this improper dividend constitutes a violation of each Board member's fiduciary duty to the association as detailed at Section 3-9 of the Act. Please be further advised that if the necessary corrective action ordered hereinabove is not accomplished within the time sequence detailed hereinabove, then it will be necessary for the Commissioner to make an evaluation of the need for further action to be taken pursuant to authority granted at Section 3-6(e) of the Act.

Within ten days of the date of this Order please provide this Office with your written assurances that you will comply with this Order of the Commissioner within the time frames established.

Very truly yours,

/s/ William J. Schilling
WILLIAM J. SCHILLING
Commissioner

cc: FHLBB
Deputy Commissioner Wilson
Chief Examiner Crown
General Counsel Hiza

Exhibit C

ILLINOIS SAVINGS AND LOAN BOARD
(312) 793-2030

C/O Room 526
160 North La Salle Street
Chicago, Illinois 60601

TO: James J. Kemp, Jr.
Lillig, Kemp & Thorsness, Ltd.
210 First Federal Office Plaza
1900 Spring Road
Oak Brook IL 60521

Paula E. Hiza, General Counsel
Office of Savings & Loan Commisioner
160 North La Salle Street
Chicago Il 60601

Harold J. Ticktin, President
Manning Savings and Loan Associaton
2854 West Cermak Road
Chicago IL 60623

William J. Schilling, Commissioner
of Savings & Loan Associations
160 North La Salle Street
Chicago IL 60601

RE: APPEAL BY MANNING SAVINGS AND LOAN ASSOCIATION OF THE ORDER OF THE COMMISSIONER OF SAVINGS & LOAN ASSOCIATIONS DATED OCTOBER 10, 1980

FINAL ADMINISTRATIVE ORDER

WHEREAS, the Illinois Commissioner of Savings & Loan Associations on October 10, 1980 issued an Order

against MANNING SAVINGS AND LOAN ASSOCIATION requesting the repayment of THREE HUNDRED FOURTEEN THOUSAND SEVEN HUNDRED SEVENTEEN AND NO/100 DOLLARS ($314,717.00) which was paid to MANNING SAVINGS AND LOAN ASSOCIATION's permanent reserve shareholders as a cash dividend; and

WHEREAS, MANNING SAVINGS AND LOAN ASSOCIATION filed Notice of Intent and Verified Complaint before the Board; and

WHEREAS, a hearing in this matter was held before the Board; and

WHEREAS, Findings of Fact and Conclusions of Law were duly adopted and served on all parties of record; and

WHEREAS, parties filed certain written Comments to the Board's Findings of Fact and Conclusions of Law which were duly considered by the Board:

NOW, THEREFORE, BE IT ORDERED THAT, the Order of the Commission of Savings and Loan Associations against MANNING SAVINGS AND LOAN ASSOCIATION dated October 10, 1980 be hereby affirmed.

Sept. 14, 1981
DATE

/s/ Joseph F. Prola
CHAIRMAN

Exhibit D

UNITED STATES OF AMERICA
Before the
FEDERAL SAVINGS AND LOAN
INSURANCE CORPORATION

In the Matter of

MANNING SAVINGS AND LOAN ASSOCIATION
CHICAGO, ILLINOIS

and

HAROLD J. TICKTIN, JOSEPH J. TICKTIN, HAROLD BROWN,
RAYMOND E. POWERS, WILLIAM HEATON, ITS DIRECTORS

Re: Federal Home Loan Bank Board
Resolution No. 81-675
November 12, 1981

NOTICE OF CHARGES AND HEARINGS

In accordance with the provisions of Section 407(e) of the National Housing Act, as amended ("Act"), (12 U.S.C. § 1730(e) (Supp. III 1979)), the Federal Savings and Loan Insurance Corporation ("FSLIC"), being of the opinion that Manning Savings and Loan Association, Chicago, Illinois ("Manning") and its directors have violated and are continuing to violate a provision of the Act and a regulation promulgated thereunder, hereby issues its Notice of Charges against Manning Savings.

I

JURISDICTION

Manning is a savings and loan association chartered by the State of Illinois that maintains its principal place of business at 2854 W. Cermak Road, Chicago, Illinois. As an institution the accounts of which are insured by the FSLIC pursuant to Title IV of the Act, (12 U.S.C. § 1724 *et seq.* (1976)), Manning is subject in all respects to the Act and the Insurance Regulations issued thereunder.

II

VIOLATION OF LAW AND REGULATION

Manning and its directors have violated and continue to violate Section 403(b) of the Act, 12 U.S.C. § 1726(b) (1976), as amended by Act of March 31, 1980, Pub. L. 96-221, 12 U.S.C.A. § 1726(b) (1980), and Section 563.13 of the Insurance Regulations, 12 C.F.R. § 563.13 (1981) as amended by 45 Fed. Reg. 50797, 76111 (1980).

Compliance with Section 563.13 was requested by the Bank Board's Supervisory Agent in 1980 and 1981 in numerous letters to and several meetings with the association's board of directors. In response to the Supervisory Agents' requests, Manning's board of directors advised the Supervisory Agents that they would take corrective action to meet the requirements of Section 563.13 of the Insurance Regulations, as amended.

At this time, Manning and its board of directors have not taken corrective action and its net worth has continued to decrease. At the December 31, 1980, closing, net worth of $932,720 was short of the required amount by $254,077. As of June 30, 1981, the net worth was $698,367 and the deficiency was $488,430.

III

NOTICE OF HEARING

Notice is hereby given that an administrative hearing will be held, pursuant to Section 407(e) of the Act, 12 U.S.C. § 1730(e) (Supp. III 1979), to determine whether an order to cease and desist should be issued against Manning and its directors. Said hearing shall commence on the thirty first day after the service of this Notice in Chicago, Illinois, the exact time of day and location to be announced at a later time. Such hearing will be conducted in accordance with the provisions of 5 U.S.C. §§ 500 *et seq.* (1976) and 12 C.F.R. §§ 509.1 *et seq.* (1981).

Manning and its directors are hereby directed to file an Answer to the allegations contained in this Notice within ten days after receipt of this notice. The requirements of the Answer and the consequences of failure to file an Answer are set forth in 12 C.F.R. § 509.5 (1981).

By the Federal Savings and
Loan Insurance Corporation

Dated: November 12, 1981

/s/ J. J. Finn
J. J. FINN
Secretary

EXHIBIT E

UNITED STATES OF AMERICA
Before the
FEDERAL SAVINGS AND LOAN
INSURANCE CORPORATION

In the Matter of

MANNING SAVINGS AND LOAN ASSOCIATION
CHICAGO, ILLINOIS

and

HAROLD J. TICKTIN, JOSEPH J. TICKTIN, HAROLD BROWN,
RAYMOND E. POWERS, WILLIAM HEATON, ITS DIRECTORS

Re: Federal Home Loan Bank Board
Resolution No. 81-675
November 12, 1981

TEMPORARY ORDER TO CEASE AND DESIST

WHEREAS, the Federal Savings and Loan Insurance Corporation ("FSLIC") has determined that the continuation of the violation of Section 403(b) of the National Housing Act, ("Act"), 12 U.S.C. § 1726(b) (1976), as amended by Act of March 31, 1980, Pub. L. 96-221, 12 U.S.C.A. § 1726(b) (1980), and Section 563.13 of the Insurance Regulations, 12 C.F.R. § 563.13 (1981) as amended by 45 Fed. Reg. 50797, 76111 (1980), as specified in the Notice of Charges served upon Manning Savings and Loan Association ("Manning") and its directors, is likely to cause insolvency or seriously weaken the financial condition of the institution prior to the completion of the proceedings.

THEREFORE, in accordance with the provisions of Section 407(f) of the Act, as amended (12 U.S.C. § 1730(f) (Supp. III 1979)), IT IS HEREBY ORDERED, that pending the completion of the administrative proceedings provided for in the Notice and until such time as the FSLIC shall dismiss the charges specified in the Notice or its cease-and-desist order against Manning and its directors has become final, Manning shall:

(1) Pay no dividend on its capital stock;

(2) Reduce the percentage of its total operating expenses to its average total assets, to below the average percentage of its peer group within its district. (As of Dec. 31, 1980, Manning's percentage was 4.40% while the average peer group percentage was 1.46%.)

(3) Infuse such capital as is necessary to maintain the solvency of the association in that the association's assets in the aggregate have a fair value that exceeds the total liabilities of the association to its creditors and to all holders of savings accounts.

IT IS FURTHER ORDERED, that Manning's directors, who are named as parties to this proceeding, shall take whatever steps are necessary to insure that these requirements are met.

This Order shall become effective upon its service upon Manning and its directors, unless set aside, limited, or suspended by a court in a proceeding authorized by Section 407(f)(2) of the Act (12 U.S.C. § 1730(f)(2) (Supp. III 1979)), shall remain effective and enforceable pending the completion of the administrative proceedings provided for in the Notice and until such time as the FSLIC shall dismiss the charges specified in the Notice or its cease-and-desist order against Manning and its directors has become final.

By the Federal Savings and
Loan Insurance Corporation

Dated: November 12, 1981

/s/ J. J. Finn

J. J. FINN
Secretary

EXHIBIT F

UNITED STATES DISTRICT COURT,
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Cause No. 81 C 6808

TICKTIN, ET AL.

v.

FSLIC, ET AL.

Plt motion for temporary restraining order

Dec. 15, 1981

Presiding Judge, Honorable JAMES B. MORAN

Plaintiff's motion for a temporary restraining order to modify FHLBB order of November 25, 1981 is granted as follows: Manning shall: (1) pay no dividend on its capital stock, except in accordance with applicable state law; (2) reduce the percentage of its total operating expenses, exclusive of GNMA transactions, to its average total assets to within the average percentage of its peer group within its district; (3) maintain such capital as is necessary to maintain the solvency of the Association under FHLBB's present valuation of policies in that the Association's assets in the aggregate have a fair value that exceeds the total liabilities of the Association to its creditors and to all holders of savings accounts. By agreement of the parties, this order will stay in full force and effect until further order of this court, brought on by motion of either party.

EXHIBIT G

UNITED STATES OF AMERICA
Before the
FEDERAL SAVINGS AND LOAN
INSURANCE CORPORATION

In the Matter of

MANNING SAVINGS AND LOAN ASSOCIATION
CHICAGO, ILLINOIS

(and)

HAROLD J. TICKTIN, JOSEPH J. TICKTIN, HAROLD BROWN,
RAYMOND E. POWERS, WILLIAM HEATON,
ITS ACTIVE DIRECTORS

Re: Federal Home Loan Bank Board
Resolution No. 81-675
November 12, 1981

AMENDED NOTICE OF CHARGES AND HEARING

In accordance with the provisions of Section 407(e) of the National Housing Act, as amended ("Act") (12 U.S.C. § 1730(e) (Supp. III 1979)), the Federal Savings and Loan Insurance Corporation ("FSLIC"), being of the opinion that Manning Savings and Loan Association, Chicago, Illinois ("Manning"), and its directors have violated and are continuing to violate a provision of the Act and a regulation promulgated thereunder, hereby issues its Amended Notice of Charges against Manning.

I

JURISDICTION

Manning is a savings and loan association chartered by the State of Illinois that maintains its principal place of business at 2854 W. Cermak Road, Chicago, Illinois. As an institution the accounts of which are insured by the FSLIC pursuant to Title IV of the Act (12 U.S.C. § 1724 *et seq.* (1976)), Manning is subject in all respects to the Act and the Insurance Regulations issued thereunder.

II

VIOLATION OF LAW AND REGULATIONS

Manning and its directors have violated and continue to violate Section 403(b) of the Act, 12 U.S.C. § 1726(b) (Supp. IV 1980), and Section 563.13 of the Insurance Regulations, 12 C.F.R. § 563.13 (1981), as amended by 47 Fed. Reg. 3543 (1982).

Compliance with section 563.13 was requested by the Bank Board's Supervisory Agent in numerous letters to and several meetings with the association's board of directors. In response to the Supervisor Agent's requests, Manning's board of directors advised the Supervisory Agents that they would take corrective action to meet the requirements of Section 563.13 of the Insurance Regulations, as amended.

At this time, Manning and its board of directors have failed to take corrective action and the association's net worth has continued to decrease. As of February 28, 1981, Manning's net worth requirement was $926,801, while its actual net worth was only $925,674, resulting in a net worth deficiency of $1,127. Thereafter Manning's net worth deficiency increased monthly until, at the end of January, 1982, its net worth requirement was $1,347,489 while its actual net worth was minus $1,116,545, resulting in a net worth deficiency of $2,404,034.

Manning presently is suffering operating losses of approximately $300,000 a month. Based upon such losses, it is reasonable to expect that Manning will continue to violate Section 563.13 in the future, absent immediate action to halt the association's financial decline.

III

NOTICE OF HEARING

Notice is hereby given that an administrative hearing will be held, pursuant to Section 407(e) of the Act, 12 U.S.C. § 1730(e) (Supp. III 1979), to determine whether an order to cease and desist should be issued against Manning and its directors. Said hearing has been set for April 5, 1982, and will be held in Chicago, Illinois, the exact time of day and location to be announced later. Such hearing will be conducted in accordance with the provisions of 5 U.S.C. §§ 551 *et seq.* (1976), and 12 C.F.R. §§ 509.1 *et seq.* (1981).

By the Federal Savings and Loan
Insurance Corporation

Dated: _____

CERTIFICATE OF SERVICE

I hereby certify that the attached Motion to Amend Notice of Charges and the proposed Amended Notice of Charges and Hearing have been served this day upon Manning Savings and Loan Association, Chicago, Illinois, and its directors by mailing copies thereof to *Kenneth L. Cunniff, Esq., Faber & Cunniff, Ltd., Attorneys for Manning Savings and Loan Association and its Directors,* 29 S. LaSalle Street, Chicago, Illinois 60603

/s/ Walter M. Strick
WALTER STRICK
Office of General Counsel

EXHIBIT H

MINUTES OF THE SPECIAL MEETING OF THE BOARD OF DIRECTORS OF MANNING SAVINGS AND LOAN ASSOCIATION HELD ON MAY 3, 1982

The Directors have called this special meeting pursuant to waiver of notice of Manning Savings and Loan Association and hereby take the following actions:

The Directors unanimously voted to pass out to the shareholders pro rata of Manning Savings and Loan Association all the stock of Manning Energy Corporation as and for a dividend in accordance with the applicable rules and regulations of the Commissioner of Savings and Loans, State of Illinois. Said stock shall be distributed as soon as possible to shareholders of record of Manning Savings and Loan Association as of May 3, 1982.

The Directors discussed the fantastic job that President Ticktin has done in maintaining the net worth of the Association in these perilous times and the Directors voted with Harold Ticktin abstaining to grant Harold Ticktin a bonus instanter of $70,000.

/s/ HAROLD J. TICKTIN
Harold J. Ticktin

/s/ JOSEPH J. TICKTIN
Joseph J. Ticktin

/s/ JUDITH TICKTIN
Judith Ticktin

/s/ HAROLD BROWN
Harold Brown

/s/ WILLIAM HEATON
William Heaton

UNITED STATES DISTRICT COURT,
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Cause No. 83 C 2997

FEDERAL SAVINGS AND LOAN INSURANCE CORP.

v.

HAROLD TICKTIN, ET AL.

MOTION TO RECONSIDER

May 8, 1984

Presiding Judge, Honorable Susan Getzendanner

* * * * *

The motion to reconsider is denied in full. An independent and alternative ground for finding jurisdiction over the subject matter of the complaint is found in *FSLIC v. Krueger,* 435 F.2d 633, 635-636 (7th Cir. 1970), and *Katin v. Apollo Savings,* 460 F.2d 422, 425 n.5 (7th Cir. 1971). These cases hold that the jurisdictional exclusion clause relied on by defendants is applicable only to cases before the court on removal. These decisions were recently followed by another court in this jurisdiction. *FSLIC, et al. v. Ticktin, et al.,* No. 83 C 2996, Order at 2-5 (N.D. Ill. Nov. 28, 1983) (McGarr, J.). Hence, even were the court persuaded by defendants' present motion, an alternative ground exists for denial.

/s/ SUSAN GETZENDANNER

UNITED STATES DISTRICT COURT,
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Cause No. 83 C 2997

FEDERAL SAVINGS AND LOAN INSURANCE CORP.

v.

TICKTIN, ET AL.

MOTION TO CERTIFY

September 19, 1984

Presiding Judge, Honorable Susan Getzendanner

* * * * *

Defendants' motion to certify is granted. (DRAFT)

/s/ SUSAN GETZENDANNER

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 83 C 2997

FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION,
PLAINTIFF

v.

HAROLD J. TICKTIN, ET AL., DEFENDANTS

MEMORANDUM OPINION AND ORDER

SUSAN GETZENDANNER, District Judge:

This action is before the court on defendants' motion to certify pursuant to 28 U.S.C. § 1292(b). The parties have addressed the question of whether certification is proper in a case governed by two controlling Seventh Circuit cases. The court grants defendants' motion.

Under § 1292(b), a court may certify an order when it determines that the order "involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation. . . ." The court in this case denied defendants' motion to dismiss for lack of subject matter jurisdiction, relying in the alternative on the Seventh Circuit's opinions in *FSLIC v. Krueger,* 435 F.2d 633, 635-36 (7th Cir. 1970), and *Katin v. Apollo Savings,* 460 F.2d 422 (7th Cir. 1971), *cert. denied,* 406 U.S. 918 (1972). In *Krueger,* the Court held that the "proviso" upon which defendants base their motion to dismiss, 12 U.S.C. § 1730(k)(1), applied only to removal proceedings from state courts in actions where the corporation was made a party. In specific,

the Court found that the proviso applied to § 1730(k)(1)(B) and (C), but not to subsection (A). Because the FSLIC is deemed an "agency" under § 1730(k)(1)(A), the Seventh Circuit held that subject matter jurisdiction existed under 28 U.S.C. § 1345.

In *Katin,* the Court noted that defendants, also challenging subject matter jurisdiction, "here invite the court to reconsider the holding [of *Krueger*]." *Id.* at 424. However, the Court declined to do so, and indeed expressly "reaffirm[ed]" the earlier decision. *Id.* at 424 & 425 n.5. Since both *Krueger* and *Katin* involved some federal claims, the holding with respect to the proviso is arguably dicta, since the receivership did not concern only state law claims. In neither case did the Seventh Circuit examine the analgous provision concerning the FDIC, namely, 12 U.S.C. § 1819 Fourth.

Defendants challenge this interpretation of § 1730(k)(1). They claim that the proviso applies to subsections (A), (B), and (C), and thus where a federal receivership concerns rights of a state bank solely under state law, federal subject matter jurisdiction is not present. Defendants argue here that the Seventh Circuit implicitly overruled the *Kruger* and *Katin* cases in *FDIC v. Braemoor Associates,* 686 F.2d 550 (7th Cir. 1982), *cert. denied,* ____ U.S. ____, 103 S.Ct. 2086 (1983). In *Braemoor,* the Court determined, without briefing by the parties, that a similar provision in 12 U.S.C. §1819 Fourth excepts from its jurisdictional grant a suit to which the FDIC is a party and acting solely as a receiver of a state bank involving rights under state law. *Id.* at 552 (following *FDIC v. Sumner Financial Corp.,* 602 F.2d 670, 679-80 (5th Cir. 1979)). A review of § 1819 Fourth reveals that it and § 1730(k)(1) are almost identical except for the former's omission of the latter's subsection (A), which denominates the FSLIC as a federal agency. Indeed, other

circuits have interpreted § 1819 Fourth as excepting jurisdiction where the FDIC acts solely as a receiver in a suit concerning rights under state law, regardless of whether the action was removed. *FDIC v. de Jesus Velez,* 678 F.2d 371 (1st Cir. 1982); *FDIC v. Ashley,* 585 F.2d 157 (6th Cir. 1978); *FDIC v. Godshall,* 558 F.2d 220 (4th Cir. 1977).. The court notes that in *Braemoor,* the Seventh Circuit did not mention *Katin* or *Krueger* or the proviso in § 1730(k)(1). The decision in *Braemoor,* as in *Krueger* and *Katin,* was not essential to the result, as the FDIC was not acting solely as a receiver.

Defendants further offer *Hancock Financial Corporation v. FSLIC,* 492 F.2d 1325 (9th Cir. 1974), to support their claim that the Seventh Circuit would now reconsider and overrule *Krueger* and *Katin.* There, the Ninth Circuit found that the proviso applied to all sections of § 1730(k)(1) despite the Seventh Circuit's "dicta" to the contrary. *Id.* at 1328 & n.2. Finally, defendants argue that the legislative history of § 1730(k)(1) indicates that it was meant to provide the same scope of jurisdiction as found in § 1819 Fourth.

The court agrees with defendants that if the § 1730(k)(1) proviso does not apply solely to removal cases, 28 U.S.C. §§ 1345, 1331, and 1337 would not provide an independent basis for jurisdiction. The court further finds that, based on defendants' citation of authority in its May 2, 1984 motion to reconsider, the present claims against defendants do not "involve" federal law. That motion to reconsider is therefore granted. The court is further unpersuaded that the federal appointment of the FSLIC as receiver in this case makes a difference to the applicability of the proviso or the question of whether federal law is "involved" in this action. Hence, it is clear that a resolution of the applicability of the proviso controls the subject matter jurisdiction of this case. It is also therefore a controlling question, the resolution of which may materially advance this litigation.

The parties have therefore briefed the issue of whether the *Katin* and *Krueger* opinions prevent a finding that there is "substantial ground for difference of opinion" on the meaning of § 1730(k)(1). The parties agree that the case most on point is *Berger v. United States,* 170 F. Supp. 795 (S.D.N.Y. 1959). There, the district court had relied on a Second Circuit decision in denying a motion to dismiss. In that decision, *Wilkinson v. United States,* 242 F.2d 735 (2d Cir. 1957), the Court had disagreed with three other circuits in its statutory interpretation. Two other circuits having joined these earlier three in diverging with the *Wilkinson* opinion, the *Berger* defendants moved to certify the district court's denial of the motion to dismiss. Finding that the Supreme Court would not likely settle the disputes among the circuits and that under the circumstances the Second Circuit was unlikely to reconsider its opinion upon the addition of two more dissenting circuits, the court denied the motion to certify.

The court agrees with defendants that *Berger* is at least distinguishable from this case. In *Berger,* the Second Circuit had confronted and rejected the analysis of three dissenting circuits. In this case, the Seventh Circuit's *Krueger* and *Katin* opinions were the first to interpret § 1730(k)(1). Of the circuits subsequently to consider § 1819 Fourth and the one circuit to consider § 173[0](k)(1), none interpreted the proviso as did the Seventh Circuit. Futhermore, the *Krueger* and *Katin* opinions are thirteen and fourteen years old, and undermined by the logic of a two year old Seventh Circuit case. At the time of the *Berger* decision, *Wilkinson* was two years old. Additionally, *Krueger* and *Katin* treated the issue at hand briefly, the latter case simply noting its aff[i]rmance without discussion.

It is explainable that *Krueger* and *Katin* were not even mentioned in *Braemoor,* as the existence of subject matter jurisdiction was not briefed on appeal and the two earlier cases concerned a different statute. However, the failure to mention these cases may also signify that the Seventh Circuit would be amenable to reconsideration. These factors distinguish this case from that in *Barnhart v. International Harvester Company,* 309 F. Supp. 206, 207 (N.D. Okla. 1970), where the district court refused certification of an issue governed squarely by Tenth Circuit authority. There, the rationale for certification was solely that a different rule was preferable and the Tenth Circuit should be persuaded to adopt a new rule on a prospective basis. Here, however, the court is presented with a situation where recent Seventh Circuit authority indicates that the earlier governing cases may no longer be good law.

The factors discussed above persuade the court to grant defendants' motion to certify. The issue of law is clearly controlling and the court has rejected all alternative bases for subject matter jurisdiction. The motion to certify is therefore granted.

It is so ordered.

/s/ SUSAN GETZENDANNER
Susan Getzendanner
United States District Judge

September 19, 1984

UNITED STATES DISTRICT COURT,
NORTHERN DISTRICT OF ILLINOIS,
EASTERN DIVISION

Case Number: 83 C 2997

FSLIC

v.

TICKTIN, ET AL.

Date: February 6, 1985

Name of Assigned Judge: Susan Getzendanner

DOCKET ENTRY

Plaintiff's motion to reconsider is denied.

* * * * *

The motion to reconsider is denied. The "involvement" of federal law in this case, identified in the new arguments set forth by plaintiff in the pending motion, is much less important to the case than the federal involvement described in the April 11, 1983 opinion. Even assuming that the court's interpretation of "involves" under 17 U.S.C. § 1730(k)(1) is correct, the federal issues now identified by plaintiff are too remotely connected with the case to satisfy even this expansive interpretation of the statute. Hence, the court's subject matter jurisdiction is based solely on the opinion in *FSLIC* v. *Kruger*, 435 F.2d 633, 635-36 (7th Cir. 1970). The court will therefore not reconsider its decision to certify of September 19, 1984. The issue certified is whether Krueger's holding that § 1730(k)(1) applies only to removal actions is of continuing viability in light of the authorities cited on pages 2-4 of the September 19, 1984 opinion.

/s/ SUSAN GETZENDANNER

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 83 C 2997

FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, IN ITS CORPORATE CAPACITY AND AS RECEIVER FOR MANNING SAVINGS AND LOAN ASSOCIATION, PLAINTIFF

v.

HAROLD J. TICKTIN, ET AL., DEFENDANTS

Judge Getzendanner

ORDER

IT IS HEREBY ORDERED:

The March 15, 1985 Order of this Court denying Plaintiff's Motion to Reconsider and granting Defendants' Motion for Certification is hereby amended, *nunc pro tunc*, to additionally include the following paragraph:

This Court finds that our denial of Defendants' Motion to Dismiss for Lack of Subject Matter Jurisdiction based upon *FSLIC* v. *Kruger*, 435 F.2d 633 (7th Cir. 1970), involves a controlling question of law as to which there is a substantial ground for difference of opinion and that an immediate appeal from this Court's Order may materially advance the ultimate termination of the litigation.

ENTER: _____
JUDGE

IRVING FABER & ASSOCIATES, LTD.
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Supreme Court of the United States

No. 87-1865

FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, AS RECEIVER FOR MANNING SAVINGS AND LOAN ASSOCIATION, PETITIONER

v.

HAROLD J. TICKTIN, ET AL.

ORDER ALLOWING CERTIORARI. Filed October 3, 1988.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit is granted.

October 3, 1988

☆ U.S. GOVERNMENT PRINTING OFFICE: 1988—241-699/60821

PETITIONER'S

BRIEF

(4)

No. 87-1865

Supreme Court, U.S.
FILED
NOV 17 1988
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1988

FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, AS RECEIVER FOR MANNING SAVINGS AND LOAN ASSOCIATION, PETITIONER

v.

HAROLD J. TICKTIN, JOSEPH J. TICKTIN, WILLIAM HEATON, HAROLD BROWN, AND JUDITH TICKTIN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

The Federal Savings and Loan Insurance Corporation (FSLIC), having been appointed by the Federal Home Loan Bank Board as receiver of a FSLIC-insured state-chartered institution, brought this suit in that capacity against former directors and shareholders of the institution to recover damages for the issuance and receipt of two dividends in violation of state and federal law. The question presented is whether the federal district court had jurisdiction over this suit under 12 U.S.C. 1730(k)(1) and 28 U.S.C. 1345.

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In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 87-1865

FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, AS RECEIVER FOR MANNING SAVINGS AND LOAN ASSOCIATION, PETITIONER

v.

HAROLD J. TICKTIN, JOSEPH J. TICKTIN, WILLIAM HEATON, HAROLD BROWN, AND JUDITH TICKTIN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-18a) is reported at 832 F.2d 1438. The opinions of the district court (Pet. App. 19a-37a; J.A. 39-46) are unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 38a-39a) was entered on November 2, 1987. An order denying the petition for rehearing and suggestion for rehearing en banc was entered on December 14, 1987 (Pet. App. 40a-41a). On March 7, 1988, Justice Stevens extended the time in which to file a petition for a writ of certiorari to and including May 12, 1988, and a petition was filed on that date. This Court granted the petition on October 3, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES AND REGULATIONS INVOLVED

The principal statute at issue, 12 U.S.C. 1730(k)(1), is set out at pages 5-6, *infra*. That provision and other pertinent federal statutes and regulations are set out in the appendix to the petition (Pet. App. 42a-71a).

STATEMENT

A. Statutory Background

Savings and loan associations (thrifts) are financial institutions that lend money and provide interest-bearing savings accounts. Historically, thrifts tended to be smaller than commercial and savings banks and had substantially more limited functions. For most of their history, thrifts have been the principal source of home mortgage loans. See F. Ornstein, *Savings Banking: An Industry in Change* (1985); T. Marvell, *The Federal Home Loan Bank Board* 4 (1969).

Prior to 1932, the regulation of thrifts was left entirely to the States. In that year, however, Congress responded to the devastating impact of the Great Depression on thrifts, their borrowers, and their depositors by enacting the Federal Home Loan Bank Act, ch. 522, 47 Stat. 725. The Act's main purpose was to create a source of funds that could be loaned to thrifts to increase their liquidity (see T. Marvell, *supra*, at 18-20); the Act created the Federal Home Loan Bank Board (Bank Board) to oversee the process. In 1933, Congress enacted the Home Owners' Loan Act, ch. 64, 48 Stat. 128. That law provided, among other things, for the creation of federal thrifts to be chartered and regulated by the Bank Board. The same year, Congress enacted the National Housing Act (NHA), ch. 847, 48 Stat. 1246. The NHA established a program of federal insurance for the deposit accounts of both federal

and state-chartered thrifts, and it created the Federal Savings and Loan Insurance Corporation (FSLIC) to administer the program.

The NHA requires the FSLIC to insure the accounts of all federally chartered thrifts. 12 U.S.C. 1726(a)(1) and (b). The statute also permits the FSLIC to make its insurance available to state-chartered thrifts on the same conditions as it is made available to federal thrifts. 12 U.S.C. 1726(a)(2) and (b). Each such insured institution must pay premiums into the FSLIC's insurance fund, which consists of a primary and secondary reserve. 12 U.S.C. 1726(b). Each such institution also is subject to periodic examinations by the FSLIC "for its protection and the protection of other insured institutions." 12 U.S.C. 1726(b). Today, the FSLIC insures the accounts of most state-chartered thrifts as well as all federal thrifts.

If an insured thrift defaults—which, as defined in 12 U.S.C. 1724(d), means that a conservator, receiver, or other legal custodian has been appointed to liquidate the institution—the FSLIC is responsible for paying the thrift's depositors "as soon as possible," either by cash from its insurance fund or by a transferred account in a new institution. 12 U.S.C. 1728(b). Avoiding defaults and the concomitant need to make payouts is a principal concern of the FSLIC and of its operating head, the Bank Board (see 12 U.S.C. 1725(b)). To that end, the FSLIC is empowered to render various types of financial assistance to ailing thrifts. 12 U.S.C. 1729(f). The FSLIC is also empowered to terminate an insured thrift's insurance, to initiate cease-and-desist proceedings, and to undertake to suspend or to remove directors or officers in circumstances that involve unsafe or unsound practices or violations of law or regulation and that thus present a risk to

the thrift's well-being. 12 U.S.C. 1730; see 12 U.S.C. 1464(d)(1)-(5).[1]

A savings and loan association is not eligible to become a bankrupt. 11 U.S.C. (& Supp. IV) 109. For a federal thrift, the only statutory path to a "corporate grave"—that is, to a "default"—is under 12 U.S.C. (& Supp. IV) 1464(d)(6)(A), which gives the Bank Board "exclusive power and jurisdiction to appoint a conservator or receiver" for a federal savings and loan association in circumstances involving insolvency, dissipation of assets or earnings due to legal violations or unsafe or unsound practices, unsafe or unsound conditions, violations of cease-and-desist orders, or concealment of or refusal to disclose records or assets of the association. If the Bank Board declares a federal thrift in default, it must appoint the FSLIC as receiver or conservator. 12 U.S.C. 1729(b)(1).

For state-chartered FSLIC-insured thrifts, state authorities may appoint a person other than the FSLIC as the receiver, but the FSLIC is obliged to act as receiver if appointed by state authorities. 12 U.S.C. 1729(c)(1)(A). Prior to 1968, only state authorities could place a state-chartered FSLIC-insured thrift in default. Since 1968, the Bank Board has had broad powers, which Congress expanded in 1982, itself to appoint the FSLIC receiver of a state-chartered FSLIC-insured thrift. 12 U.S.C. 1729(c)(1)(B) and (2). See Garn-St Germain Depository Institutions Act of 1982, Pub. L. No. 97-320, § 122(d) and (g), 96 Stat. 1482-1483; Bank Protection Act of 1968, Pub. L. No. 90-389, § 6, 82 Stat. 295-296. Specifically, under 12

[1] The Bank Board is empowered to promulgate regulations governing federal thrifts (12 U.S.C. 1464(a)). The FSLIC is directed to provide insurance under the direction of the Bank Board and to be "operated by it under such bylaws, rules, and regulations as it may prescribe for carrying out the purposes of [the FSLIC subchapter]" (12 U.S.C. 1725(a)).

U.S.C. 1729(c)(1)(B), the Bank Board has the power to place a state-chartered FSLIC-insured institution in receivership in certain circumstances involving insolvency, dissipation of assets, or unsafe or unsound conditions. And under 12 U.S.C. 1729(c)(2), the Bank Board has the power to "federalize" the receivership of a thrift previously placed in default by state authorities in certain circumstances. In any such case, as where a federal thrift is placed in default, it is the FSLIC that must act as the receiver of the thrift (12 U.S.C. 1729(c)), and the FSLIC has the duty, among others, "to liquidate such institution in an orderly manner or to make such other disposition of the matter as it deems to be in the best interests of the institution, its savers, and the [FSLIC]" (12 U.S.C. 1729(c)(3)(B)). In liquidating an insured thrift, the FSLIC as receiver or conservator is given broad power to take all necessary actions, including collecting all obligations to the thrift, subject only to the regulation of the Bank Board or, in cases where the FSLIC was appointed by a public authority other than the Board, subject only to the regulation of that authority. 12 U.S.C. 1729(d).

Section 1730(k)(1) of Title 12, United States Code, addresses the jurisdiction of the federal courts to hear suits involving the FSLIC. That section was enacted in 1966 as part of the Financial Institutions Supervisory Act of 1966, Pub. L. No. 89-695, § 102(a), 80 Stat. 1042. It states in pertinent part (*ibid.* (emphasis in original)):

> Notwithstanding any other provision of law, (A) the Corporation [FSLIC] shall be deemed to be an agency of the United States within the meaning of section 451 of title 28; (B) any civil action, suit, or proceeding to which the Corporation shall be a party shall be deemed to arise under the laws of the United States, and the United States district courts shall have

original jurisdiction thereof, without regard to the amount in controversy; and (C) the Corporation may, without bond or security, remove any such action, suit, or proceeding from a State court to the United States district court for the district and division embracing the place where the same is pending by following any procedure for removal now or hereafter in effect: *Provided*, That any action, suit, or proceeding to which the Corporation is a party in its capacity as conservator, receiver, or other legal custodian of an insured State-chartered institution and which involves only the rights or obligations of investors, creditors, stockholders, and such institution under State law shall not be deemed to arise under the laws of the United States. * * *

B. Proceedings Below

1. Prior to February 1983, Manning Savings and Loan Association (Manning) was a savings and loan association chartered by the State of Illinois and insured by the FSLIC. In that month, the Bank Board, acting pursuant to 12 U.S.C. 1729(c)(1)(B), appointed the FSLIC to be the receiver of Manning. Subsequently, the FSLIC brought this suit against respondents, all of whom were directors of Manning, and three other persons. Two of the respondents (Harold and Joseph Ticktin) were shareholders as well as directors; the other three respondents (William Heaton, Harold Brown, and Judith Ticktin) were directors but not shareholders.[2]

[2] Harold Ticktin was the President and Managing Officer of Manning; he was also a director and shareholder. Prior to October 1982, Joseph Ticktin, who is Harold's father, was a director and shareholder and was Manning's attorney. Judith Ticktin, who is Harold's wife, was a director of Manning. So, too, were Harold Brown, who is Judith Ticktin's father, and William Heaton. Of the defendants that are not respondents in this Court, Raymond Powers was a director of Manning prior to Judith Ticktin's election, and both Bruce Watters and Grace Church Co. were shareholders. See J.A. 4-5.

According to the complaint, in 1980, Manning's directors declared a dividend of more than $400,000 to all "permanent reserve" shareholders (chiefly, certain directors themselves). The dividend was illegal because Manning did not have sufficient net worth or reserves to pay a dividend of that magnitude under either state or federal law. J.A. 6. The Illinois Commissioner of Savings and Loan Associations subsequently determined that the dividend violated Illinois law for those reasons and ordered the directors to recoup more than $300,000 of the dividend. The directors did not recoup any portion of the dividend. *Ibid.*

The FSLIC in late 1981 issued a Notice of Charges and Hearing alleging that Manning had violated federal net worth requirements, 12 U.S.C. 1726(b); 12 C.F.R. 563.13. The FSLIC simultaneously issued a cease-and-desist order, pursuant to 12 U.S.C. 1730(f), temporarily prohibiting the payment of dividends. J.A. 6-7. The United States District Court for the Northern District of Illinois modified the order, enjoining Manning not to pay dividends except in accordance with state law. *Id.* at 7. In April 1982, the FSLIC amended the Notice of Charges and Hearing to advise Manning and its directors that Manning had a negative net worth of more than $500,000, was more than $2 million below the net worth required to maintain FSLIC insurance, and had monthly operating losses of approximately $300,000. Pet. App. 21a; J.A. 7. Nevertheless, in May 1982, respondents, acting as the Board of Directors, authorized the distribution of a dividend consisting of stock in a company whose assets were valued at

more than $300,000. Pet. App. 20a-21a; J.A. 8. That dividend, like the 1980 dividend, was illegal because Manning did not meet the net worth and reserve requirements of state and federal law. J.A. 8.

The first count of the complaint asserts directors' liability, alleging that all of the directors are liable for breaching their state-law-based fiduciary duties to Manning in the following respects: declaring dividends, in violation of Ill. Ann. Stat. ch. 17, paras. 3093, 3110, 3111 (Smith-Hurd 1981), when required reserves were not present; causing Manning to violate the cease-and-desist order of the FSLIC, as modified by the federal court; dissipating assets by granting dividends knowing that or recklessly disregarding whether net worth and reserve requirements were not met; disobeying the Illinois Commissioner's order issued after the 1980 dividend. J.A. 8-9. Count I also asserts directors' liability against Harold and Joseph Ticktin based on their conflicts of interest with Manning, including a conflict of interest in violation of federal regulation, 12 C.F.R. 571.7(b). J.A. 9.[3] Based on the same allegations, the first count alleges that Harold Ticktin is further liable to Manning for breaching his fiduciary duties as an officer. *Id.* at 10.[4]

The second count of the complaint asserts shareholders' liability on the part of the shareholder-defendants, alleging that they were unjustly enriched by the receipt of the illegal dividends. J.A. 11-12. The third count of the complaint alleges that respondents breached their duties to Manning under federal law (a) by causing Manning to violate the cease-and-desist order issued by the FSLIC, as modified by the federal court (*id.* at 13), and (b) by placing themselves in a position that created a conflict of interest with Manning, in violation of federal regulations, 12 C.F.R. 571.7(b) (J.A. 13). Those breaches of federal-law duties, the complaint asserts, substantially contributed to the dissipation of assets effected by the 1982 dividend (*ibid.*). See Pet. App. 20a-22a.[5]

2. In the district court, jurisdiction over the FSLIC's claims as receiver for Manning was invoked not only under 12 U.S.C. 1730(k)(1), which is set out above, but also under 28 U.S.C. 1345.[6] The latter provision, which was enacted in 1948 (Act of June 25, 1948, § 1, ch. 646, 62 Stat. 933), states:

> Except as otherwise provided by Act of Congress, the district courts shall have original jurisdiction of all civil actions, suits or proceedings commenced by the United States, or by any agency or officer thereof expressly authorized to sue by Act of Congress.

The FSLIC pointed out in the district court that, if the proviso of Section 1730(k)(1) does not apply, then Section 1730(k)(1) and 28 U.S.C. 1345 establish two independent

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[3] The complaint also alleges that the directors violated a FSLIC regulation, 12 C.F.R. 563.33, by allowing more than two members of the same immediate family to be directors. Pet. App. 20a, 31a; J.A. 4.

[4] Count I adds that the directors' distributions of dividends constituted actual and constructive fraud, were reckless, and were grossly negligent. J.A. 10.

[5] The three counts of the complaint among them seek compensatory damages, restitution, and exemplary damages.

[6] The complaint includes a claim brought by the FSLIC in its separate corporate capacity, but that claim was dismissed by the district court (Pet. App. 24a), was not pursued on appeal, and is not at issue in this Court.

In addition, the complaint relies on 28 U.S.C. 1331 and 1337 as grounds of jurisdiction, but those provisions, as relevant here, add nothing to the bases of jurisdiction contained in Section 1730(k)(1).

bases for federal court jurisdiction over this suit. First, Clause (B) of Section 1730(k)(1) grants jurisdiction because the FSLIC is a party to this case. Second, 28 U.S.C. 1345 grants jurisdiction because the FSLIC is an "agency • • • expressly authorized to sue by Act of Congress." Clause (A) of Section 1730(k)(1) states that FSLIC is an agency for purposes of 28 U.S.C. 451, and hence it is an agency for purposes of 28 U.S.C. 1345[7]; and under 12 U.S.C. 1725(c)(4), FSLIC has "power • • • [t]o sue and be sued." See also 12 U.S.C. 1729(b) and (c)(1)(B)(i)(II) (powers of FSLIC as receiver); 12 U.S.C. 1729(d) (power to collect obligations to institution).

Respondents argued to the district court, however, that this suit falls within the jurisdiction-limiting proviso of Section 1730(k)(1) and that jurisdiction is for that reason lacking. The district court denied respondents' motion to dismiss on that ground (Pet. App. 19a-37a). At the outset, the court agreed with respondents (*id.* at 24a) that one precondition for the proviso to apply is met here: the case, according to the district court, does involve only the rights of Manning and its investors, creditors, and stockholders. The court stated that the fact "[t]hat some defendants here are directors as well as stockholders does not persuade the court the action should be removed from the proviso's coverage" (*ibid.*).

Nevertheless, the court held that the proviso is not applicable because the case does not "involve[]" only rights and obligations "under State law." That requirement of the proviso, the court observed (Pet. App. 24a-25a), is not satisfied merely because all claims "arise under" state law; rather, the court said, because the case "requires the interpretation of federal law, it falls outside of the proviso's scope" (*id.* at 25a). Here, the court held, the state-law claims for breach of duty are based on and would require resolution of federal-law questions – notably, whether the dividends violated the FSLIC regulations establishing net worth and reserve requirements.[8] Concluding that the proviso of Section 1730(k)(1) therefore does not apply to this case, the district court held that it had jurisdiction.[9]

The district court subsequently denied respondents' motion to reconsider, noting that, as an alternative ground for its ruling, there was Seventh Circuit precedent for restricting the proviso to removal cases (J.A. 38). On respondents' motion to certify the jurisdictional ruling for appeal, the court wrote a draft opinion placing exclusive reliance on the removal precedent and abandoning its earlier view that the present case "involves" federal law (J.A. 42). After initially vacating that opinion, the court denied the FSLIC's motion to reconsider its certification opinion and certified its finding of federal jurisdiction for appeal (J.A. 45, 46).

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[7] 28 U.S.C. 451 gives definitions of the term "agency" and of other terms "[a]s used in this title."

[8] The district court also observed that whether dividends could lawfully have been paid is "to be determined under accounting principles in part recognized by the [Bank Board] for a federal association" (Pet. App. 26a). The FSLIC pointed out to the court, in addition, that the case involves the federal question whether respondents violated the cease-and-desist order (*id.* at 25a).

[9] The district court focused only on the state-law claims for relief in resolving the jurisdictional issue, because it concluded (Pet. App. 31a-37a) that the federal laws and orders allegedly violated do not themselves give the FSLIC as receiver a cause of action for damages. The court also ruled that, although the Illinois statutes relied on by the FSLIC do not provide a cause of action to the FSLIC as receiver (*id.* at 28a-29a), Illinois common law does furnish a cause of action against both the directors and the shareholders (*id.* at 29a-31a). The FSLIC does not contest any of those rulings.

3. The United States Court of Appeals for the Seventh Circuit reversed, holding that the proviso of Section 1730(k)(1) bars federal-court jurisdiction in this case (Pet. App. 1a-18a).[10] The FSLIC contended that the proviso does not limit the jurisdiction that the district court has under 28 U.S.C. 1345, because the proviso declares only that certain cases do not arise under federal law, and Section 1345 confers jurisdiction over suits commenced by an "agency" regardless of whether they arise under federal law. The FSLIC also contended that the district court has jurisdiction in any event under Clause (B) of Section 1730(k)(1). The court of appeals ruled that the proviso bars jurisdiction under both statutes.

With respect to 28 U.S.C. 1345, the court noted (Pet. App. 11a-12a) that the purpose of Clause (A) of Section 1730(k)(1) was to confirm that the FSLIC is an agency for purposes of Section 1345—a point that had been in dispute just before Section 1730(k)(1) was enacted in 1966. See *Acron Investments, Inc.* v. *FSLIC*, 363 F.2d 236 (9th Cir.), cert. denied, 385 U.S. 970 (1966). Clause (A) was not intended, the court concluded (Pet. App. 11a-12a), to establish a basis of jurisdiction that is not subject to the limits of the proviso. The court reasoned that Congress could not have intended to confer jurisdiction under Clause (A) and Section 1345 in all cases in which the FSLIC is a plaintiff, while conferring jurisdiction only

[10] The court first rejected prior Seventh Circuit statements (see *Katin* v. *Apollo Savings*, 460 F.2d 422 (1971), cert. denied, 406 U.S. 918 (1972); *FSLIC* v. *Krueger*, 435 F.2d 633, 636 (1970)) that Clause (B) and the proviso of Section 1730(k)(1) apply only to removals from state court proceedings and not to actions commenced initially in federal court. The court held that Clause (B) is a grant of original jurisdiction limited by the proviso. Pet. App. 5a-9a. That ruling is not challenged here.

within the limits stated in the proviso when the FSLIC is a defendant, because Clause (B) grants jurisdiction whenever the FSLIC is a "party," defendant or plaintiff, and does not suggest an intention to distinguish the two situations. The proviso, the court therefore held (Pet. App. 12a), states an absolute limit on federal-court jurisdiction, whether founded on Clause (B) or on 28 U.S.C. 1345.[11]

[11] In so concluding, the court of appeals also relied (Pet. App. 10a-11a) on *FDIC* v. *Sumner Financial Corp.*, 602 F.2d 670 (5th Cir. 1979), which held that the Federal Deposit Insurance Corporation (FDIC), as receiver of a state bank, could not assert Section 1345 jurisdiction in a case that came within the proviso of 12 U.S.C. 1819 Fourth, the counterpart for the FDIC of the FSLIC's Section 1730(k)(1). Section 1819 Fourth states, in pertinent part:

> All suits of a civil nature at common law or in equity to which the Corporation shall be a party shall be deemed to arise under the laws of the United States, and the United States district courts shall have original jurisdiction thereof, without regard to the amount in controversy; and the Corporation may, without bond or security, remove any such action, suit, or proceeding from a State court to the United States district court for the district or division embracing the place where the same is pending by following any procedure for removal now or hereafter in effect, except that any such suit to which the Corporation is a party in its capacity as receiver of a State bank and which involves only the rights or obligations of depositors, creditors, stockholders, and such State bank under State law shall not be deemed to arise under the laws of the United States. • • •

The provision is essentially identical to Section 1730(k)(1) except that it has no counterpart to the latter provision's Clause (A) declaring the FSLIC an agency. The *Sumner* court observed that Section 1730(k)(1) might be construed differently from Section 1819 Fourth, pointing out that when Congress enacted Section 1730(k)(1) in 1966, it took note of the fact that Clause (A) has no counterpart in Section 1819 Fourth. 602 F.2d at 680, citing S. Rep. 1482, 89th Cong., 2d Sess. 19 (1966), and *Financial Institutions Supervisory Act of 1966: Hearings on S.*

Turning to the interpretation of the proviso, the court of appeals held that the proviso applies to this case. The court first rejected the FSLIC's contention that, because the suit involves claims against Manning's former directors (and one officer), it does not involve "only the rights or obligations of investors, creditors, stockholders, and [the failed] institution" (Section 1730(k)(1)). The court concluded that the proviso applies whenever the only "rights" in the case are those of the failed institution, regardless of who the defendants are. Pet. App. 13a-15a.

The court similarly rejected the FSLIC's contention that the case does not involve "only * * * rights or obligations * * * under State law" (Section 1730(k)(1)). The FSLIC pointed out that the complaint alleges, in support of the state-law causes of action, that respondents caused violations of federal law—notably, the FSLIC's net worth and reserve requirements.[12] But the court found that fact insufficient to take the case out from under the proviso of Section 1730(k)(1). The court observed (Pet. App. 16a) that the proviso uses the words "involves only * * * rights or obligations * * * under State law," rather than the words "involves only State law." The proviso would be rendered all but meaningless, the court stated, if it were

3158 Before a Subcomm. of the Senate Comm. on Banking and Currency, 89th Cong., 2d Sess. 319M (1966) (section-by-section analysis of the bill submitted by the FSLIC, FDIC, Federal Reserve Board, and Comptroller of the Currency). Apparently unpersuaded by this basis of distinction, the court of appeals in the present case extended to Section 1730(k)(1) the *Sumner* holding regarding Section 1819 Fourth.

[12] The FSLIC also argued that respondents violated federal criminal statutes, 18 U.S.C. 657, 1006, and regulations establishing bookkeeping and reporting requirements, and that those violations support the claim of breach of state-law fiduciary duties. See Pet. App. 16a.

read as inapplicable to any case that involves any question of federal law: "[e]very suit with the FSLIC as a party necessarily involves federal law" (*ibid.*). The court concluded that, because all the questions in this case are "subsidiary questions" to the state-law question whether respondents breached their fiduciary duties, and the case involves only rights to recover under state law, the case comes within the proviso of Section 1730(k)(1) (Pet. App. 16a-17a).[13] The court therefore remanded the case with instructions that it be dismissed for lack of jurisdiction (*id.* at 18a).

SUMMARY OF ARGUMENT

The FSLIC brought this action as a federal agency carrying out receivership functions assigned to it under federal statutes. The action plainly comes within the terms of the grants of federal jurisdiction in 28 U.S.C. 1345 and in Clause (B) of Section 1730(k)(1). It also comes within the policy underlying those bases of jurisdiction, which Congress established to afford the protection of a federal forum to the important federal interests at stake in suits like this. The proviso of Section 1730(k)(1), which is stated as an exception to Section 1730(k)(1)'s broad grant of jurisdiction in cases involving the FSLIC, should be construed strictly so as not to deprive the FSLIC of a federal forum in any case in which the language of the proviso does not so require. Contrary to the court of appeals' view, the proviso, properly construed, does not oust the federal courts of jurisdiction in this case: the proviso is limited to disputes involving only state-law questions among a failed thrift and claimants against its estate, and

[13] The court also rejected the argument that the proviso was not applicable because the FSLIC had been appointed receiver by the Bank Board rather than by state authorities (Pet. App. 17a-18a).

it impairs only federal-question jurisdiction and not federal-agency jurisdiction under 28 U.S.C. 1345.

The proviso applies only to cases that "involve[] only the rights or obligations of investors, creditors, stockholders, and [the failed] institution" (Section 1730(k)(1)). This case does not meet that description, because the case involves, in addition to the rights of the failed institution, the obligations of directors and officers—persons not listed in the proviso. Confining the proviso to cases that involve only disputes among the proviso parties and that do not involve anyone else is the only way to give effect to Congress's decision to list "investors, creditors, [and] stockholders" in the proviso: those words are deprived of all effect if, as the court of appeals ruled, the proviso is construed to apply to all cases in which the only claims are those which involve the rights or obligations of the failed thrift. Moreover, the line distinguishing those listed) in the proviso (claimants against the receivership estate) from those not listed (directors, debtors, and other "outsiders" that receivers quite commonly sue) was a natural one for the 1966 Congress that enacted Section 1730(k)(1). The proviso sensibly built on the practice of centralizing claims seeking distribution from the estate in the state court having jurisdiction over it, while affording the FSLIC access to state or federal court to pursue actions to collect property of the estate, which would not be centralized in any event.

This case is outside the coverage of the proviso for an additional reason. The proviso does not apply unless a case involves only "rights or obligations * * * under State law" (Section 1730(k)(1)), but this case involves respondents' obligations, not just under state law, but also under federal law. In particular, respondents' federal-law obligations under FSLIC financial and conflict-of-interest

regulations and a federal cease-and-desist order are centrally at issue in the case. Contrary to the court of appeals, the proviso is not applicable simply because the claims "arise under" state rather than federal law. The proviso does not use that language to define its coverage. Instead, it leaves federal-court jurisdiction intact whenever, as here, the case involves the adjudication of a federal question.

Finally, even if the proviso were applicable to this case, it would not deprive the federal court of jurisdiction. The proviso does not sweepingly bar any federal jurisdiction in the cases it covers; it declares more narrowly that such cases do not arise under federal law. The federal-agency jurisdiction established by 28 U.S.C. 1345, which does not depend on the presence of arising-under jurisdiction, therefore is unaffected by the proviso. The court of appeals' contrary view—that the proviso deprives the federal courts of Section 1345 jurisdiction whenever it deprives the federal courts of the jurisdiction they have under Clause (B) of Section 1730(k)(1)—not only is contradicted by the proviso's language but would nullify Clause (A) of Section 1730(k)(1).

ARGUMENT

THE DISTRICT COURT HAS JURISDICTION IN THIS CASE BOTH UNDER CLAUSE (B) OF SECTION 1730(k)(1) AND UNDER 28 U.S.C. 1345, AND THE PROVISO OF SECTION 1730(k)(1) DOES NOT DEPRIVE THE DISTRICT COURT OF SUCH JURISDICTION

A. Introduction

In 1948, Congress, building on statutes dating back to 1789, enacted 28 U.S.C. 1345 to give federal district courts jurisdiction over suits brought by any federal agency that is expressly authorized by statute to sue. See P. Bator,

D. Meltzer, P. Mishkin, & D. Shapiro, *Hart & Wechsler's The Federal Courts and The Federal System* 1080 (3d ed. 1988). In 1966, focusing specifically on the FSLIC, Congress enacted Section 1730(k)(1) not only to confirm that the FSLIC is an "agency" but, more broadly, to declare as a general rule that all civil cases to which the FSLIC is a party are to be deemed to arise under federal law and, indeed, are within the federal courts' jurisdiction whatever the amount in controversy.[14] Congress thus determined that the FSLIC should generally be entitled to avoid any potential prejudice favoring local interests in state courts and to protect the important federal interests that the FSLIC represents in federal court, whose independence is guaranteed by Article III of the Constitution.

The general rule recognized by Section 1730(k)(1) applies not only when the FSLIC is litigating in its corporate capacity carrying out its statutorily authorized functions as insurer, as regulator, or, for example, as holder of notes acquired from failed thrifts. The rule also applies when the FSLIC is litigating in its capacity as receiver for a failed thrift: neither Clause (A) nor Clause (B) of Section 1730(k)(1) (nor Clause (C), concerning removal) makes any exception for the FSLIC when acting as a receiver. Moreover, that application is fully justified by the policy of affording federal interests represented by the federal government "the protection of a federal forum" (*Willingham* v. *Morgan*, 395 U.S. 402, 407 (1969) (discussing removal statute, 28 U.S.C. 1442(a)(1)): important federal interests are at stake when the FSLIC acts as receiver, which is why Congress provided for the FSLIC to act as receiver of insured thrifts.

[14] The amount-in-controversy requirement for jurisdiction under 28 U.S.C. 1331 was not eliminated until 1980. See Federal Question Jurisdictional Amendments Act of 1980, Pub. L. No. 96-486, § 2(a), 94 Stat. 2369.

The most concrete federal interest at stake in a FSLIC receivership derives from the fact that the FSLIC in its corporate capacity, as subgrogee of the insured depositors whose claims it pays in a liquidation, is typically the party with the single largest claim in any receivership of a failed FSLIC-insured thrift. See *Savings and Loan Receiverships: Hearing on S. 3436 Before the Senate Comm. on Banking & Currency*, 90th Cong., 2d Sess. 10-11 (1968) (statement of Chairman of Bank Board). Hence, the nationwide insurance fund has a direct stake in each liquidating receivership. More generally, as is starkly apparent from the current crisis in the FSLIC-insured industry, the sound conduct of each receivership affects the stability of the FSLIC-insured system as a whole. In particular, the premiums that must be paid to the FSLIC fund by the insured institutions depend in part on the drain placed on the fund by the institutions that fail (see 12 U.S.C. 1727(c)),[15] which in turn depends on the ability of the FSLIC to carry out its various obligations as receiver—notably, the duty to marshal assets of the failed thrift (12 C.F.R. 549.3, 569a.6) so as "to proceed to liquidate its assets in an orderly manner" (12 U.S.C. 1729(b)(1)(A)(v) and (c)(3)(B)). Congress made a general determination in Section 1730(k)(1) that the FSLIC can better and more efficiently protect the important federal interests at stake in its litigation if it has access to federal courts, with their uniform rules of procedure and constitutionally guaranteed independence from the local pressures that frequently accompany litigation over a failed savings and loan.

[15] The FSLIC fund is currently billions of dollars short of the money that will be required to meet all of its obligations to the record number of failed FSLIC-insured thrifts. As a consequence, the FSLIC has placed a "special assessment" on the insured institutions to recoup some of its losses. See 53 Fed. Reg. 40271 (1988).

It is against the background of that general policy that the proviso of Section 1730(k)(1) should be read. Indeed, the structure of the section—that it is a proviso we are construing—itself means that the language at issue should be read strictly so as not to defeat or to diminish unnecessarily the policies recognized in the general grants of jurisdiction stated in the opening clauses of Section 1730(k)(1).[16] Moreover, the recent and continuing spate of failures of FSLIC-insured thrifts has already generated and will continue to generate a large volume of litigation, and disputes about the FSLIC's jurisdictional provision have already consumed substantial resources of litigants and courts. Careful application of the terms of Section 1730(k)(1)'s proviso is the surest way to minimize the expenditure of further resources on jurisdictional disputes—as well as to ensure that the many suits, like the present one, that the FSLIC has brought in federal court are not now dismissed for lack of jurisdiction, after the time for filing in state court has lapsed in many such cases.[17]

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[16] It has long been "consecrated almost as a maxim in the interpretation of statutes, that where the enacting clause is general in its language and objects, and a proviso is afterwards introduced, that proviso is construed strictly, and takes no case out of the enacting clause which does not fall fairly within its terms." *United States* v. *Dickson,* 40 U.S. (15 Pet.) 141, 165 (1841). See 2A C. Sands, *Sutherland's Statutes & Statutory Construction* § 47.08, at 135 (4th ed. 1973); W. Eskridge & P. Frickey, *Cases and Materials on Legislation: Statutes and the Creation of Public Policy* 646 (1988).

[17] Cf. *Cheng Fan Kwok* v. *INS,* 392 U.S. 206, 212 (1968) ("As a jurisdictional statute, it must be construed both with precision and with fidelity to the terms by which Congress has expressed its wishes."); *Heckler* v. *Edwards,* 465 U.S. 870, 877 (1984) (discussing 28 U.S.C. 1252: "the consequence of an erroneous choice of forum can be to preclude any court's review" and, therefore, "litigants ought to be able to apply a clear test to determine" whether they have brought their cases to the right court).

As we explain more fully below, a careful reading of the proviso's language, together with consideration of its context and the background of its enactment, strongly suggests that it was written to preserve state court jurisdiction over run-of-the-mill state-supervised receivership proceedings brought under state law to distribute the limited assets of state-chartered thrifts among rival claimants. In traditional receivership and bankruptcy law, suits by claimants seeking a distribution from the estate typically are centralized in a single forum having jurisdiction over the receivership property. In 1966, when the proviso was enacted, state authorities supervised the receivers of state-chartered thrifts and had jurisdiction over the receivership property; and it was therefore necessary, in order to achieve centralization of the claims against the estate property in a single court, to carve out an exception to Section 1730(k)(1)'s general rule of federal jurisdiction. By contrast, suits in which the receiver seeks to collect estate assets typically are not centralized (no single court would be expected to have personal jurisdiction over the defendants in all such suits); and so there was no need for an exception to federal jurisdiction for claims brought by the FSLIC against outsiders, which would not be centralized in any event. Congress thus defined the proviso, first, by borrowing the traditional notion of centralization of claims against a state thrift's estate in state court; it then narrowed the proviso's scope further by restricting it to cases that involve only questions under state law. In that way, Congress wrote the proviso generally to channel into state court suits brought by claimants under state law against the estate of the state-chartered thrifts, and to leave the FSLIC free to pursue its claims against other persons in any court having jurisdiction over them, including federal court.

The court of appeals misunderstood the design of the proviso and incorrectly construed it to deny federal-court jurisdiction over the present suit, which was brought by the FSLIC as receiver against persons not listed in the proviso and which involves the obligations of parties under federal law. The court of appeals' decision is incorrect for at least three reasons. First, the proviso does not apply to a suit that involves the rights or obligations of a non-proviso party—*i.e.*, a person who is not the failed institution, an investor, a creditor, or a stockholder.[18] Second, the proviso does not apply to a suit that involves a claim that the defendants violated "obligations" under federal law, even if the right to damages for that violation arises under state law. Third, the proviso does not limit the federal-agency jurisdiction that, as Clause (A) confirms, 28 U.S.C. 1345 grants to the federal courts over suits initiated by the FSLIC acting in either its corporate capacity or its capacity as receiver. Accordingly, the proviso does not negate

[18] The courts of appeals have adopted different views on this point. The Eighth Circuit has joined the Seventh Circuit in rejecting the view that the presence of a non-proviso party renders the proviso inapplicable. *FSLIC* v. *Capozzi*, 855 F.2d 1319 (1988). By contrast, three circuits have found the Section 1730(k)(1) proviso inapplicable because a non-proviso party was present in the case. *Andrew D. Taylor Trust* v. *Security Trust Federal Savings & Loan Ass'n, Inc.*, 844 F.2d 337, 341-342 (6th Cir. 1988); *Fidelity Financial Corp.* v. *FSLIC*, 834 F.2d 741, 744-745 (9th Cir. 1987); *North Mississippi Savings & Loan Ass'n* v. *Hudspeth*, 756 F.2d 1096, 1100-1101 (5th Cir. 1985), cert. denied, 474 U.S. 1054 (1986); see also *FSLIC* v. *Frumenti Development Corp.*, 857 F.2d 665 (9th Cir. 1988). In *American National Bank* v. *FDIC*, 710 F.2d 1528, 1533 n.5 (11th Cir. 1983), the Eleventh Circuit drew the same conclusion applying the FDIC's comparable proviso, 12 U.S.C. 1819 Fourth. As noted above, the Fifth Circuit in *FDIC* v. *Sumner Financial Corp.*, *supra*, adopted a reading of the FDIC's proviso contrary to *Hudspeth*'s reading of Section 1730(k)(1).

the jurisdiction that the federal courts otherwise have in this case under Section 1730(k)(1) and Section 1345.

B. The Proviso of Section 1730(k)(1) Does Not Apply Because This Case Involves The Obligation Of Persons Not Listed In The Proviso

The court of appeals first erred in concluding that this case satisfies the test of the proviso that it "involve[] only the rights or obligations of investors, creditors, stockholders, and [the failed] institution" (Section 1730(k)(1)). That language is most naturally read to restrict the reach of the proviso to cases that involve the listed parties and no one else—that is, cases in which no person is a party except the persons identified in the proviso (the proviso parties). On this straightforward reading, the proviso does not apply here because this case involves the obligations of directors and officers of Manning, who as such are not "investors, creditors, stockholders, [or the] institution."[19] This case therefore does not "involve[] only the rights or obligations" of the parties listed in the proviso.

In the court of appeals' view (Pet. App. 13a), the proviso applies in every case in which the only claims are those asserted by the receiver on behalf of the failed institution, regardless of whether the claims are asserted against a proviso party or someone else. That view is contrary to the natural meaning of the proviso, for if such claims are

[19] Respondents are all former directors of Manning, and the complaint asserts claims against them in their capacity as directors. Respondent Harold Ticktin was also an officer of Manning, and the complaint asserts a claim against him in that capacity. It is irrelevant to those claims whether respondents were also shareholders. In any event, three respondents were not shareholders. See note 2, *supra*.

asserted against a non-proviso party, the case involves the obligations of someone other than an investor, creditor, or stockholder. For example, the fact that each claim in this case involves the rights of the failed institution does not mean that the case involves "only" such rights: this case also involves the obligations of directors, who are not listed in the proviso. Hence, it does not involve "only the rights or obligations" of proviso parties.

Nothing in the legislative history of Section 1730(k)(1), which is sparse, supports a contrary construction of the proviso. As we have noted, Section 1730(k)(1) was enacted in 1966. The only commentary on the provision in the pertinent congressional documents simply describes it and observes that it is similar to the FDIC's proviso in 12 U.S.C. 1819 Fourth. See S. Rep. 1482, 89th Cong., 2d Sess. 19 (1966); *Financial Institutions Supervisory Act of 1966: Hearings on S. 3158 Before a Subcomm. of the Senate Comm. on Banking and Currency*, 89th Cong., 2d Sess. 319M (1966) (section-by-section analysis of the bill submitted by the FSLIC, FDIC, Federal Reserve Board, and Comptroller of the Currency).[20]

The legislative history of the FDIC's proviso sheds no additional light on what the 1966 Congress understood when it borrowed from the FDIC provision in writing Section 1730(k)(1). The FDIC provision was enacted in 1935. Banking Act of 1935, ch. 614, § 101, 49 Stat. 692 (codified originally at 12 U.S.C. (1940 ed.) 264(j) Fourth).[21] That

[20] The House Report, H.R. Rep. 2077, 89th Cong., 2d Sess. (1966), does not discuss the provision.

[21] 12 U.S.C. 1819 Fourth was amended in the same 1966 legislation that contained Section 1730(k)(1): Congress added an express provision for removal of actions to federal court and eliminated the jurisdictional amount requirement for federal-question jurisdiction. Financial Institutions Supervisory Act of 1966, Pub. L. No. 89-695, § 205, 80 Stat. 1055. The proviso in 12 U.S.C. 1819 Fourth, however, was not altered.

proviso is limited to suits that involve only the rights or obligations of "depositors, creditors, stockholders and [the failed] bank" under state law. Its legislative history, too, offers no explanation for Congress's decision to list those particular persons in the proviso: the House and Senate Committee Reports merely give simplified descriptions of the provision. H.R. Rep. 742, 74th Cong., 1st Sess. 4 (1935); S. Rep. 1007, 74th Cong., 1st Sess. 5 (1935).[22]

Construing the proviso to render it applicable even where the FSLIC as receiver makes claims against non-proviso parties would erase Congress's decision to list particular parties in the proviso: it would make certain of the terms of the proviso superfluous. The receiver for a failed state-chartered financial institution quite frequently has reason to bring suit against a variety of persons, including borrowers, guarantors, and other debtors, as well as those in a relationship of trust with the failed institu-

[22] The House Report (H.R. Rep. 742, *supra*, at 4) states: "Under the provisions of title I [of the Act], Federal courts have jurisdiction over suits to which the Corporation is a party where the amount involved exceeds $3,000, but an exception is made where the Corporation is a party in its capacity as receiver of a State bank." The Senate Report (S. Rep. 1007, *supra*, at 5) states: "new matter is added giving jurisdiction, in the case of suits of a civil nature to which the Corporation is a party, to courts having jurisdiction of suits arising under the laws of the United States. It is provided that any suit to which the Corporation is a party in its capacity as receiver of a State bank and which involves only rights to be determined according to State laws shall not be deemed to arise under the laws of the United States."

The FDIC's jurisdictional provision was recodified without change as part of 12 U.S.C. (1952 ed.) 1819 Fourth by the Federal Deposit Insurance Act of 1950, ch. 967, § 2, 64 Stat. 881. The committee reports that accompany the 1950 Act do not comment on the provision. See S. Rep. 1269, 81st Cong., 2d Sess. (1950); H.R. Rep. 2564, 81st Cong., 2d Sess. (1950); H.R. Conf. Rep. 3049, 81st Cong., 2d Sess. (1950).

tion, such as directors, officers, attorneys, accountants, and other professionals. See, *e.g.*, 12 U.S.C. 1729(b) and (d), 1821(d); 12 C.F.R. 548.2, 549.3; *FSLIC* v. *Dixon*, 835 F.2d 554, 562 (5th Cir. 1987). Indeed, such suits against persons who are not listed in the proviso are an essential part of the receiver's function of "collect[ing] all obligations to the insured institutions" (12 U.S.C. 1729(d)) and marshaling the assets of the institution (12 C.F.R. 549.3, 569a.6). If Congress had meant the proviso to cover the large class of common receivership cases involving non-proviso parties, it could easily have said so: it could have declared the proviso applicable to all cases involving the rights or obligations of the failed institution (under state law) and omitted any reference to other classes of litigants. But Congress chose instead to list, in addition to the failed institution itself, only "investors, creditors [and] stockholders" of the receivership estate.[23] Those words would be nullified by the court of appeals' reading of the proviso.

Although the legislative history furnishes no explanation for the drafting of the proviso, the identities of the parties listed in the proviso of Section 1730(k)(1) suggest what idea governed the listing. Aside from the failed institution itself, whose rights or obligations are always in issue when the FSLIC is a party to the case in its capacity as receiver for the institution, the proviso lists "investors, creditors [and] stockholders"; and it does not list the numerous other persons, such as debtors and directors of

[23] We read the term "creditors" in this context as encompassing all persons with claims against the receivership estate, whether based on contract or tort. See 11 U.S.C. (& Supp. IV) 101(9) (bankruptcy code definition of "creditors"); 12 C.F.R. 569a.1-569a.8 (treating all claims against the estate of a state-chartered institution in FSLIC receivership as "creditors" claims).

the thrift, that a receiver commonly brings suit against. The apparent design suggested by Congress's choice about whom to list in the proviso was to cover only cases involving the rights or obligations of the persons that have claims against the assets of the failed institution, not cases involving claims the receiver has against "outsiders."

The listing of the limited class of persons in the proviso is consistent with what appears to be the primary purpose of the proviso: to preserve state-court jurisdiction over proceedings for distributing a receivership's assets among rival claimants. Suits by claimants seeking a distribution from the estate, in traditional receivership law and bankruptcy law, typically are centralized in a single forum having jurisdiction over the receivership property. See, *e.g.*, *United States* v. *Bank of New York & Trust Co.*, 296 U.S. 463, 477 (1936); Ill. Stat. Ann. ch. 17, para. 371 (Smith-Hurd 1981 & Supp. 1988); 2 D. Cowans, *Bankruptcy Law and Practice* § 576, at 217 (2d ed. 1978) (summary jurisdiction of bankruptcy courts under pre-1978 law); 75 C.J.S. 2d *Receivers* § 271, at 906-907 (1952). By contrast, suits in which the receiver seeks to collect estate assets typically are not centralized; indeed, no single court would be expected to have personal jurisdiction over the defendants in all such suits. See, *e.g.*, Ill. Stat. Ann. ch. 17, para. 372 (Smith-Hurd 1981 & Supp. 1988); 2 D. Cowans, *supra*, at 218-219 (pre-1978 bankruptcy law generally did not centralize receiver's suits in bankruptcy court); 75 C.J.S.2d *Receivers* § 322, at 998 (1952).[24]

[24] See also Tex. Rev. Civ. Stat. Ann. art. 852a, § 8.09 (Vernon Supp. 1988) (directing liquidating agent of failed thrift to enforce collection of property of the thrift, while channeling all claims against the thrift through the liquidating agent and, if necessary, a single state court). In addition, under current bankruptcy law, the district court where the bankruptcy petition is filed has exclusive jurisdiction over

That distinction was a natural one for the 1966 Congress to take as its model when it enacted the proviso.[25] Prior to 1968, state-chartered thrifts were placed into receivership only by state authorities, which supervised the receivers and had jurisdiction over the receivership property. In that situation, to achieve centralization of the claims against the estate property in a single court, it was necessary to carve out an exception to Section 1730(k)(1)'s general rule of federal jurisdiction, so that such claims would, at least ordinarily, be heard in the state courts.[26] By contrast,

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the property of the estate (28 U.S.C. (Supp. IV) 1334(d)), and claims against the estate must be filed in that court (see 11 U.S.C. 501); by contrast, the district court does not have exclusive jurisdiction over so-called "related proceedings," including suits brought by a bankruptcy trustee, pursuant to the duty to collect property of the estate (11 U.S.C. (& Supp. IV) 704), to collect on an obligation to the bankrupt that arose prior to the bankruptcy (28 U.S.C. 1334(c)(2); 1 L. King, *Collier Bankruptcy Manual* ¶ 3.01(1)(c)(iv), at 3.24 to 3-27 (3d ed. 1988)). Similarly, 12 U.S.C. 94 specifies a single venue for all actions against a national banking association for which the FDIC has been made receiver or against the FDIC in such capacity, whereas it does not specify a single venue for suits by the FDIC as receiver.

[25] The traditional receivership/bankruptcy model was only the starting point for Congress's drafting of the proviso. The proviso is not limited to cases requiring jurisdiction over the receivership property but applies as well to cases in which a proviso party seeks only to establish its claim. Compare *Riehle* v. *Margolies*, 279 U.S. 218, 223-224 (1929) (discussing suits merely seeking to establish the validity of a claim but not seeking distribution of assets); *FDIC* v. *Citizens State Bank*, 130 F.2d 102 (8th Cir. 1942) (comity as reason for federal court refraining from adjudicating claim that would be adjudicated in state proceeding). And the proviso does not apply, even if a claim is made against the receivership property, if the case does not involve only rights or obligations under state law.

[26] The proviso's effect would be generally to leave no alternative basis of federal jurisdiction available for such claims. Notably, the proviso abrogates all federal-question jurisdiction, including the implied federal-question jurisdiction for some federally chartered corporations (see 28 U.S.C. 1349 (limiting such jurisdiction); *In re Dunn*, 212 U.S. 374 (1909)). Moreover, diversity jurisdiction under 28 U.S.C. 1332 would not generally be available to the FSLIC based on its own citizenship. A federal corporation that is not specifically granted citizenship in a particular State is not deemed to be a citizen of any State and hence cannot meet the diversity requirement (see, *e.g.*, *Federal Intermediate Credit Bank* v. *Mitchell*, 277 U.S. 213, 214 (1928); *Bankers Trust Co.* v. *Texas & Pacific R.R.*, 241 U.S. 295, 309-310 (1916); *Harris* v. *American Legion*, 162 F. Supp. 700 (S.D. Ind.), aff'd, 261 F.2d 594 (7th Cir. 1958); *First Carolinas Joint Stock Land Bank* v. *New York Title & Mortgage Co.*, 59 F.2d 350, 351 (E.D.S.C. 1932)); and there is no such special grant for the FSLIC, which is a federal corporation.

there was no need for an exception to the general rule of federal jurisdiction for claims brought by the FSLIC against outsiders, which would not be centralized in any event. Accordingly, Congress wrote the proviso generally to channel suits by claimants against the estate into state court—adding the further restriction that the suits involve only questions under state law—and to leave the FSLIC free to pursue claims against others in any court having jurisdiction over them, including federal court.[27] This case is therefore not among those which the proviso was designed to except from the general grant of federal jurisdiction.

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[27] The 1968 legislation that empowered the Bank Board to appoint the FSLIC receiver of even state-chartered thrifts (see pages 4-5, *supra*) substantially altered the circumstances in which the proviso operates. But Congress has not reconsidered the proviso, and the changes in the legal landscape have not changed its meaning. The idea of centralizing claims against the receivership estate (but not claims by the estate) provides the most plausible account of why the proviso was written as it was by the 1966 Congress—and, indeed, of why the 1935 Congress drafted and enacted the FDIC's proviso, on which Section 1730(k)(1) is modeled.

C. The Proviso of Section 1730(k)(1) Does Not Apply Because This Case Involves The Parties' Obligations Under Federal As Well As State Law

The court of appeals also erred in holding that this case satisfies the test of the proviso that it involve only "the rights or obligations" of the parties "under State law" (Section 1730(k)(1)). As a matter of plain statutory language, the proviso does not apply to a case that involves the obligations of defendants under federal law. This is such a case, because it involves the obligations of the respondent directors under federal law: the FSLIC has asserted, in support of the claim of breach of fiduciary duties, that respondents failed to comply with various federal-law obligations, including those under a federal cease-and-desist order and under FSLIC regulations establishing net worth and reserve requirements and conflict-of-interest proscriptions.

Thus, the FSLIC alleged, as one of the respondents' breaches of fiduciary duty, that respondents caused Manning to declare dividends in violation of state statutes that require compliance with "the reserve requirements of the insurer, which in the case of Manning was the FSLIC" (Pet. App. 15a). See Ill. Ann. Stat. ch. 17, §§ 3093, 3110, 3111 (Smith-Hurd 1981); J.A. 6, 8 (1980 and 1982 dividends violated federal net worth and reserve requirements). The FSLIC also alleged, in the same cause of action, that respondents caused Manning to violate the 1981 federal cease-and-desist order, which was issued based on Manning's violation of federal statutory and regulatory net worth requirements (12 U.S.C. 1726(b); 12 C.F.R. 563.13; see J.A. 6-7). In addition, all respondents were alleged to have declared the dividends with knowledge that, or in reckless disregard of whether, the required reserves and net worth were deficient; and respondents Harold and Joseph Ticktin particularly were

alleged to have breached their fiduciary duties by placing themselves in a position that created a conflict of interest with Manning in violation of federal regulation (12 C.F.R. 571.7(b)). It could not be plainer that those allegations place centrally in issue in this lawsuit respondents' obligations under federal law.[28]

The court of appeals nevertheless found the proviso's language applicable because the relevant provisions of federal law do not themselves give rise to a cause of action. The court noted (Pet. App. 16a) that the proviso speaks of "rights or obligations * * * under State law," not of claims that "involve only State law." But the proviso's use of the word "under" does not support the court's conclusion. This case *does* involve the "obligations" of respondents "under" federal law, not just their obligations "under State law," as the proviso requires.

The court of appeals' analysis, which focuses on the source of the cause of action, would read the proviso as if it covered all claims that "arise under" state law, or all claims except those which "arise under" federal law. That, however, is not how the proviso is written. Indeed, Congress's failure to use the familiar "arising under" terminology in defining what suits are within the proviso's coverage is especially telling, because Section 1730(k)(1) elsewhere uses the words "arise under" in two places, once in the proviso itself. Had Congress wished the proviso to

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[28] Although the net worth and reserve regulations directly apply only to the institution, they indirectly impose obligations on the institution's directors. The FSLIC has the authority under 12 U.S.C. 1730(e) to initiate cease-and-desist proceedings against directors who take action to place the institution in violation of the regulations. The FSLIC also has authority to suspend or to remove directors for sufficiently harmful breaches of fiduciary duty. 12 U.S.C. 1730(g).

apply in all cases where federal law is not the source of the cause of action, it surely would have said so.[29]

The language that Congress chose instead—restricting the proviso to cases that involve only rights or obligations "under State law"—serves an obvious policy that is ignored by the court of appeals' view that the proviso applies whenever the source of the cause of action is state law. By restricting the proviso to cases that involve "only rights to be determined according to State laws," as the Senate Report described the FDIC's proviso upon its enactment in 1935 (S. Rep. 1007, 74th Cong., 1st Sess. 5 (1935)), Congress left to the state courts only cases that are peculiarly within their expertise while providing for federal jurisdiction over cases involving federal questions. In light of Section 1730(k)(1)'s otherwise plenary grant of jurisdiction to the federal courts to hear cases involving the FSLIC, there is no warrant for reading the proviso to exclude from federal-court jurisdiction cases, like the present one, that may involve numerous questions of the proper interpretation of federal law.

Finally, contrary to the court of appeals' view, giving the proviso its natural reading—restricting it to cases that involve only questions of state law—would not bring into federal court "[e]very suit with the FSLIC as a party" (Pet. App. 16a). To be sure, suits like this one against directors very often involve federal-law questions, because of the extensive federal regulation of FSLIC-insured institutions and the consequent federal-law obligations of those in a

[29] Although some claims "arise under" federal law even if federal law does not supply the cause of action (see *Franchise Tax Bd.* v. *Construction Laborers Vacation Trust*, 463 U.S. 1, 19 (1983)), we have not contended in this case that the state-law claims arise under federal law. See *Merrell Dow Pharmaceuticals, Inc.* v. *Thompson*, 478 U.S. 804 (1986).

position of trust with the institutions. Claims by proviso parties against the assets of the failed institution, by contrast, often involve only questions of state law—chiefly, contract law and corporation law. As explained above, those claims are precisely what the proviso, in its most natural reading, is designed to cover.[30]

D. The Proviso Of Section 1730(k)(1) Does Not Affect The Federal Agency Jurisdiction Established By 28 U.S.C. 1345 And Confirmed By Clause (A) Of Section 1730(k)(1)

The court of appeals further erred in holding that the proviso deprives the district court of the jurisdiction it has under 28 U.S.C. 1345. That section states that, except as otherwise provided by law, the federal courts have jurisdiction over suits commenced by an "agency" of the United States that is expressly authorized to sue by act of Congress. This suit meets the requirements for jurisdiction under that provision.

This suit was commenced by the FSLIC. Clause (A) of Section 1730(k)(1) expressly confirms that the FSLIC is an "agency" for purposes of 28 U.S.C. 451, the section that defines "agency" for purposes of 28 U.S.C. 1345. More-

[30] When, pursuant to the powers granted to the Bank Board after the 1966 enactment of Section 1730(k)(1) (see 12 U.S.C. 1729(c)(1)(B) and (2)), the Bank Board appoints the FSLIC as receiver of any thrift, including a state-chartered thrift, the FSLIC conducts the receivership "subject to the regulation of the [Bank Board]" (12 U.S.C. 1729(d)), and no court may "restrain or affect the exercise of powers or functions of [the FSLIC]" (12 U.S.C. 1464(d)(6)(C); see 12 U.S.C. 1729(c)(3)(A)). There may be cases in which the fact that the FSLIC was appointed receiver by the Board, rather than by state authorities, means that rights or obligations under federal law are presented that would not otherwise be in the case and that the case is for that reason not within the proviso. See *Carrollton-Farmers Branch Ind. School Dist.* v. *Johnson & Cravens, 13911, Inc.*, No. 87-1835 (5th Cir. Oct. 27, 1988). We do not contend that that is so in this case.

over, Clause (A) applies when the FSLIC is acting in its capacity as receiver as well as when the FSLIC is acting in its corporate capacity: the absence of any distinction along that line in Clause (A)—or in Clauses (B) or (C)—contrasts sharply with the presence of that distinction in Section 1730(k)(1)'s proviso; and, of course, the functions of receiver are just as much functions assigned by statute to the federal agency as are the FSLIC's other functions. Finally, the FSLIC is authorized "[t]o sue and be sued" (12 U.S.C. 1725(c)(4)) and has broad powers to take the actions it deems appropriate as receiver of a failed institution (see 12 U.S.C. 1729(c) and (d)).[31] In fact, those provisions in all material respects predate the enactment of Clause (A) and are independently sufficient to permit the FSLIC to invoke the jurisdiction of federal courts under 28 U.S.C. 1345.

The plain terms of the proviso of Section 1730(k)(1) make clear that it does not override the jurisdiction granted by 28 U.S.C. 1345. The proviso states only that suits described therein "shall not be deemed to arise under the laws of the United States." Jurisdiction under 28 U.S.C. 1345, however, does not depend on whether the claim arises under federal law: Section 1345 grants juris-

[31] Indeed, at least where, as here, the FSLIC is appointed receiver by the Bank Board, rather than by state authorities, its authority to bring suits where necessary is solely dependent on federal and not state law. See 12 U.S.C. 1729(d) (FSLIC conducts receivership "subject only to the regulation of" the Bank Board); 12 U.S.C. 1464(d)(6)(C) (court may not restrain or affect the FSLIC's receivership powers); S. Rep. 1263, 90th Cong., 2d Sess. 10 (1968) (the FSLIC, once appointed by the Board, is not subject to the regulation "of any State authority, administrative or judicial"); 114 Cong. Rec. 18298-18299 (1968) (remarks of Rep. Patman); *Savings and Loan Receiverships: Hearing on S. 3436 Before the Senate Comm. on Banking and Currency*, 90th Cong., 2d Sess. 7 (1968) (statement of the Chairman of the Bank Board).

diction whenever the plaintiff is a federal agency, regardless of the nature of the claim. The effect of the proviso is simply to withdraw the jurisdiction granted by Section 1730(k)(1)'s general declaration in Clause (B) that all cases to which the FSLIC is a party are deemed to arise under federal law. The proviso has no effect on jurisdictional grants, like Section 1345, that do not turn on whether a case arises under federal law. Indeed, if Congress had wished to override such jurisdictional grants, it could easily have written the proviso to say that the specified class of cases "shall not be within the jurisdiction of the district courts." Congress instead declared only that such cases do not arise under federal law, leaving jurisdictional provisions like Section 1345 fully operative.

That conclusion is reinforced by this Court's decision in *Colorado River Water Conservation Dist.* v. *United States*, 424 U.S. 800 (1976), which held that Section 1345 jurisdiction was not overridden by the separate scheme established in the McCarran Amendment, 43 U.S.C. 666, for the state-court adjudication of certain water-rights disputes involving the United States. The Court stated (424 U.S. at 808 (citations omitted)): "When there are statutes clearly defining the jurisdiction of the courts, the force and effect of such provisions should not be disturbed by a mere implication flowing from subsequent legislation. * * * In the absence of some affirmative showing of an intention to repeal, the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable." In the present context, there plainly is no irreconcilable conflict between Section 1345 (enacted in 1948) and the proviso (enacted in 1966); in fact, as we have suggested, the proviso would have to be rewritten for its language to bear the construction that it affects other than federal-question jurisdiction.

Nor is there any reason to believe that Congress actually intended the proviso to override Section 1345 even though the proviso's language does not say so. The 1966 Congress that enacted Section 1730(k)(1) merely took note that the analogous FDIC jurisdictional provision, 12 U.S.C. 1819 Fourth, did not contain an express declaration that the FDIC was an agency. The 1966 legislative history does not refer to Section 1345 or otherwise explain the difference between the treatment of the FSLIC and the FDIC (see sources cited page 24, *supra*).[32] And for obvious reasons, nothing in the 1935 legislative history of 12 U.S.C. 1819 Fourth deals with Section 1345 jurisdiction, because it was not until 1948 that Congress provided for general federal-agency plaintiff jurisdiction, as 28 U.S.C. 1345 now does. Act of June 25, 1948, ch. 646, 62 Stat. 933.[33] Moreover, the considerations that led Congress to allow federal agencies to bring actions in federal courts, whether or not they arise under federal law, are fully applicable to FSLIC suits like the present one brought against directors and officers of a failed institution. The FSLIC is a federal agency; it serves as receiver of state-chartered institutions like Manning at the behest of the Bank Board; and it does so not only to put the affairs of the institution in order but to protect important interests of the federal regulatory and insurance programs.

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[32] The Fifth Circuit in *FDIC* v. *Sumner Financial Corp.*, *supra*, thought that the difference between Section 1730(k)(1) and Section 1819 Fourth might be significant. See note 11, *supra*.

[33] The absence of such jurisdiction, together with the fact that there may be cases where the FDIC as receiver does sue a proviso party, explains why its proviso is written to apply when the FDIC is a "party" rather than a "defendant." And the 1966 Congress, when enacting the FSLIC's Section 1730(k)(1), merely borrowed the language of the proviso from 12 U.S.C. 1819 Fourth without focusing on its relation to Clause (A) of Section 1730(k)(1).

The court of appeals, instead of being guided by the statutory language, simply asserted (Pet. App. 11a-12a) that Congress did not intend Section 1345 jurisdiction to apply to cases that fall within the proviso. The court of appeals did not point to any legislative history that expresses an intent contrary to the statutory text. Instead, it argued (a) that Congress added Clause (A) in 1966 merely "to clarify that the FSLIC was an agency" in light of the then-recent litigation in *Acron Investments, Inc.* v. *FSLIC*, *supra*, and (b) that, because Clause (B) of Section 1730(k)(1) applies both when the FSLIC is a party defendant and when it is a party plaintiff, Congress must have intended the proviso to apply equally to both situations and hence to limit Clause (A) as well. Those arguments, however, are inadequate to support a ruling contrary to the language of the proviso.

First, if, as the court of appeals suggested, Congress added Clause (A) to reaffirm the position that the FSLIC had recently prevailed on in *Acron*,[34] the point of Congress's action must have been to make clear what the language says and *Acron* holds, namely that the FSLIC is an agency such that any suit commenced by it may be brought in federal court under 28 U.S.C. 1345. On the other hand, if the court of appeals' view that the proviso limits both Clause (B) and Clause (A) is correct, it is not clear why Congress saw any need to reaffirm *Acron* or to include Clause (A) at all, for the court's view makes Clause (A) jurisdictionally redundant: Clause (A) and the *Acron* ruling would add nothing whatever to the jurisdiction conferred by Clause (B), because the latter clause by itself confers jurisdiction in all cases in which the FSLIC is a party and the proviso does not apply. But if, as the

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[34] In fact, there appears to be no mention of *Acron* in the legislative history of the 1966 enactment.

language suggests, the proviso limits only Clause (B) jurisdiction, then Clause (A) serves to clarify that, where the FSLIC is a plaintiff, the federal courts do have "agency" jurisdiction under 28 U.S.C. 1345 even though the suit is not one deemed to arise under federal law. This reading of Section 1730(k)(1) is the only one that gives any independent significance to Clause (A).[35]

In addition, the court of appeals thought that the proviso must be read to affect Section 1345 jurisdiction as well as Clause (B) jurisdiction because the court could not understand why Congress would have made the proviso applicable to one but not the other basis of jurisdiction. But such bewilderment is not a sound basis for holding that the proviso has a meaning that is contrary to its language. In any event, the court's concern about allowing Section 1345 to diminish the significance of the proviso rests on a misconception about the proviso's operation. As we have explained, the proviso lists particular parties because it is concerned with claims against the assets of the failed institution held in the receivership estate. Suits involving such claims are rarely if ever commenced by the FSLIC. Section 1345 thus does not grant jurisdiction over any appreciable number of cases that fall within the proviso, properly construed.

In the end, the court of appeals' conclusion rests on the idea that the FSLIC's proviso must be held applicable to Section 1345 jurisdiction so that Section 1730(k)(1) may be treated, as the Fifth Circuit treated the FDIC's proviso in

[35] The court of appeals noted that 28 U.S.C. 1345 begins "[e]xcept as otherwise provided" and stated that Section 1730(k)(1) provides the necessary overriding "polic[y]" (Pet. App. 12a). But a "policy" standing alone could not override the language of Section 1345. In any event, the court of appeals failed to identify any policy that fully accounts for all of Section 1730(k)(1) and that overrides Section 1345.

FDIC v. *Sumner Financial Corp.*, 602 F.2d at 678, as a "self-contained scheme for jurisdiction over cases involving" the agency. But such a notion, without concrete support in statutory language or legislative history, is plainly inadequate to support the distortion of the statutory language that the court's view would require. And, this Court correctly held just such a notion insufficient to override Section 1345 in *Colorado River Conservation Dist.* v. *United States, supra.*

Moreover, even if the "self-contained scheme" idea were adequate to support the holding that Section 1345 jurisdiction is ousted by the FDIC's proviso, 12 U.S.C. 1819 Fourth—which, in light of the statutory language, it is not—there would be no basis for such a holding with respect to the FSLIC's proviso. Although the FDIC's jurisdictional provision, when enacted in 1935, might have been characterized as "self-contained," in that the federal-question jurisdiction that the provision expressly modified was the principal if not sole alternative basis of jurisdiction for the FDIC,[36] the same cannot be said of the FSLIC's provision, which was enacted in 1966. By that time, as the *Acron* decision had recently confirmed, the FSLIC could assert federal-agency jurisdiction under 28 U.S.C. 1345. Against that background, it is wholly inappropriate to "construe" the proviso, which is limited to federal-question jurisdiction, as having been more broadly intended to cover other grounds of jurisdiction that it does not mention. Indeed, the notion that Section 1730(k)(1) was intended as a "self-contained" jurisdictional scheme for the FSLIC is contradicted by the fact that the 1966

[36] There was, at the time, no general federal-agency jurisdiction. Moreover, diversity jurisdiction was not available to corporations in 1935 (see *FDIC* v. *Elefant*, 790 F.2d 661 (7th Cir. 1986)), and would not seem to have been generally available in any event to the FDIC, which is a federally chartered corporation (see note 26, *supra*).

enactment that contained Section 1730(k)(1) itself included other provisions that expressly or implicitly granted jurisdiction. See, *e.g.*, 12 U.S.C. (& Supp. IV) 1730(j) and (q). Hence, the proviso should be read, as its language unmistakably provides, to oust the federal courts only of federal-question jurisdiction and to leave Section 1345 jurisdiction intact.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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RESPONDENT'S

BRIEF

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In The
Supreme Court of the United States
October Term, 1988

FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, AS RECEIVER FOR MANNING SAVINGS AND LOAN ASSOCIATION,

Petitioner,

v.

HAROLD J. TICKTIN, JOSEPH J. TICKTIN, WILLIAM HEATON, HAROLD BROWN AND JUDITH TICKTIN,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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ADDITIONAL STATEMENT OF THE CASE

Count III of the complaint alleged that the respondents breached their duty to Manning Savings and Loan Association (Manning) under federal law by causing Manning to violate the cease and desist order issued by FSLIC and by violating the conflict of interest prohibition of 12 C.F.R. 571.7(b) in declaring dividends while they were permanent reserve shareholders. J.A. 8-13. The introductory part of the complaint also cited 12 C.F.R. 563.33 concerning the number of members of the same immediate family who may be members of the board of directors, but the plaintiff's claims were not based thereon. J.A. 4-13.

The district court held that the declaration of dividends issued ratably to the shareholders did not constitute a conflict of interest. Pet. App. 28a-29a. The district court dismissed Count III for failure to state a claim. Pet. App. 37a. No appeal or cross-appeal from the rulings of the district court was filed by the plaintiff.

SUMMARY OF ARGUMENT

This appeal involves only the State-based claims of FSLIC, as receiver of Manning Savings and Loan Association (Manning), a State-chartered institution. FSLIC's claim in its corporate capacity as well as its claim for liability under federal law were dismissed in the district court for failure to state a claim (Pet. App. 24a; 37a) and were not pursued in the court of appeals. In the counts

subject to this appeal plaintiff charged that the respondents breached their fiduciary duties to Manning under the Illinois Savings and Loan Act. The court of appeals held that federal jurisdiction was barred by the proviso in 12 U.S.C. 1730(k)(1) and ordered the complaint dismissed.

An understanding of the proviso must be based on the Senate report to the bill which enacted it, explaining that it was patterned after the existing jurisdictional provision for FDIC in 12 U.S.C. 1819 Fourth. As hereafter shown, the legislative history of the latter supports the Seventh Circuit's interpretation of the proviso.

Petitioner argues that the proviso is inapplicable because (1) this suit is against the former directors, who are non-proviso parties; (2) the suit involves federal law; and (3) the agency jurisdiction of 28 U.S.C. 1345 governs. These arguments are untenable.

First. The proviso is not concerned with the rights and obligations of parties adverse to the receiver, and since this receiver is suing to enforce the rights of the institution, the proviso applies.

Second. The mere involvement of federal law is not material, since the proviso applies to suits *under* State law. This is such a suit.

Third. The proviso states an absolute bar to federal jurisdiction for FSLIC, which cannot be circumvented by resort to the general grant of jurisdiction by 28 U.S.C. 1345.

ARGUMENT

I. PETITIONER'S CLAIMS INVOLVED ONLY THE RIGHTS OF THE INSTITUTION (MANNING) AND WERE BARRED BY THE PROVISO IN 12 U.S.C. 1730(k)(1).

The proviso clearly tells us that when FSLIC sues or defends as receiver of a State-chartered institution and only the rights or obligations of investors, creditors, stockholders, and such institution under State law are involved, the district court shall not have jurisdiction. Investors, creditors and stockholders are parties which may have an interest in the litigation identical with that of the institution and may be represented by the receiver. On the other hand, directors, as such, are not likely to be in that position. The party adverse to the receiver necessarily has an obligation, since the corollary of every right is an obligation, but the proviso is not concerned with the rights and obligations of adverse parties. The proviso is designed "to direct attention, solely to FSLIC's role in bringing such action and what rights or obligations it seeks to protect or enforce". (*FSLIC v. Huff,* 631 F.Supp. 1350, 1354 (D. Kansas 1986) appeal dismissed on other grounds, 851 F.2d 316). As stated by the court below (832 F.2d at 1444) and adopted in *FSLIC v. Capozzi,* 855 F.2d 1319, 1323 (8th Cir. 1988):

> If, as in this case, the receiver who represents the institution, brings suit to enforce the rights of the institution and the resolution of those rights is the only question in the suit, then the suit "involves only the rights or obligations of . . . such institution", regardless of who the defendants are.

The almost identical proviso for FDIC, in 12 U.S.C. 1819 Fourth, has also been interpreted in this manner. *FDIC v. Braemoor Associates,* 686 F.2d 550, 562 (7th Cir. 1982), cert. denied 461 U.S. 927 (1983); and other cases cited at 832 F.2d 1444.

As thus interpreted, with the focus on suits brought by the receiver, both the FSLIC and FDIC provisos serve a useful purpose in protecting the district courts from the flood of claims, large and small, acquired by the receiver in the takeover of notes and mortgages held by the insolvent bank or savings and loan.[1]

Contrasting with this straightforward and sensible approach, petitioner, without citing any authority, has proposed an interpretation which focuses on claimants against the assets of the receivership (Brief 27). This is contrary to the natural reading of the proviso, which refers to actions in which the *receiver* is a party and naturally to *his* rights and obligations rather than those of adverse parties.[2] According to petitioner's interpretation,

1. Similarly, 28 U.S.C. 1349 which bars federal jurisdiction by or against federal corporations unless more than one-half of the stock is owned by the United States was enacted "to stem the flood of litigation" in the district courts. *Murphy v. Colonial Federal Savings & Loan,* 338 F.2d 609, 612 (2d Cir. 1967).

2. Petitioner cites cases from several circuits, which actually support the position of the Seventh Circuit (Brief 22 n. 18). These cases significantly refrained from holding that the presence of the adverse party made the proviso inapplicable, instead, relying on the presence of a third party and ignoring the party adverse to the receiver. For example, in *American National Bank v. FDIC,* 710 F.2d 1528, 1533 n. 5 (11th Cir. 1983) the interest of the party adverse to the receiver in the interpleaded funds was certainly greater than that of the stakeholder of the funds, whose presence the court relied upon to find jurisdiction.

the receiver of a State-chartered institution could bring into the federal court any small claim of the insolvent thrift, regardless of the amount in controversy as provided in part B, on the basis that the defendant is a non-proviso party, a result hardly necessary to protect "important federal interests" which petitioner argues for (Brief 18).

The legislative history also negates petitioner's interpretation. Section 1730(k)(1) with its proviso was enacted by the Financial Institutions Supervisory Act of 1966, which patterned it after the jurisdictional provision in 12 U.S.C. 1819 Fourth and intended similar jurisdiction for the two agencies. *See* 1966 U.S. Code Cong. & Admin. News, p. 3550. When the earlier FDIC provision was introduced, by the Banking Act of 1935, there was already on the books a special venue statute for claims against all banks, requiring that they be filed in the district, county or city in which the bank is located (12 U.S.C. 94). If, as petitioner proposes, with reference to FSLIC, the FDIC proviso was designed for centralization of claims against the bank receivership, Congress would have enacted it as an amendment to 12 U.S.C. 94 or referred to it or adopted its language. When that statute was later amended (by the Garn-St. Germain Depository Act of 1982, 96 Stat. 1512), it ignored the jurisdictional proviso of 12 U.S.C. 1819 Fourth. Furthermore, the jurisdictional proviso did not require a single forum but permitted suit in any State court. Clearly, the jurisdictional proviso was not designed to deal with claims against the receivership.

II. PETITIONER'S COMPLAINT ONLY INVOLVED MANNING'S RIGHTS UNDER STATE LAW, AND THE SUIT IS BARRED BY THE PROVISO IN SECTION 1730(k)(1).

The proviso applies to rights and obligations *under* State law, even though federal law may also be involved. As pointed out by the court of appeals (832 F.2d at 1445), the proviso applies to a suit "which involves only the rights or obligations . . . under State law", not just to a suit "which involves only State law". If the mere involvement of State or federal law were the test, it would not be clear what degree of federal involvement would be substantial enough to take a case out of the proviso, and the precision required for the construction of a jurisdictional statute (Cf. *Heckler v. Edwards,* 465 U.S. 870, 877 (1984)) would be lacking unless a whole body of interpretative law were developed.

The phrase "under State law" (which is synonymous with "arising under State law") is fairly precise, in view of the large body of law, already existing, pursuant to 28 U.S.C. 1331 and 1337. *See Franchise Tax Board v. Construction Laborers Vacation Trust,* 463 U.S. 1, 8 (1983) ("A suit arises under the law that creates the cause of action", a statement by Justice Holmes which is still useful for describing the vast majority of cases intended to be covered thereby.) Congress, in enacting the proviso in 12 U.S.C. 1819 Fourth many years after the appearance of the "arising under" expression of Section 1331 and the development of case law pursuant thereto, must have intended that the FDIC term would be interpreted in conformity with the similar expression in Section 1331.

The inter retation of "under State law" by the Seventh Circuit was adopted by the Eighth Circuit (*FSLIC*

v. Capozzi, 855 F.2d 1319, 1324 (8th Cir. 1988)) and is supported by the legislative history of the prototypal provision in 12 U.S.C. 1819 Fourth. Senate Report No. 1007 to the Banking Act of 1935 explained the proviso as covering suits "to be determined *according to State laws,*[3] which is an unambiguous expression of a cause of action *created* by State law.

If the federal regulations involved in this case are material at all, they are so only in providing a standard of conduct, whose violation triggered a breach of fiduciary duty under Illinois law, both common and statutory. However, the incorporation of a federal standard in a State-law private action does not make the action one arising under the laws of the United States pursuant to 28 U.S.C. 1331. *Merrell Dow Pharmaceuticals v. Thompson,* 478 U.S. 804 (1985). Conversely, the action must be one arising out of State law.

Furthermore, the federal violations[4] cited do not constitute an essential element of the claim but only part of the basis therefor. Since the dividends in dispute were

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3. Quoted in petitioner's Brief (p. 25 n. 22). More accurately, the quotation refers to *rights* to be determined according to State laws, entirely omitting reference to obligations. This omission disproves petitioner's argument concerning the respondents' obligations. Evidently, the "rights or obligations" in the proviso are those which create the cause of action being sued on or defended against by the receiver, and rights only were mentioned in the Senate report because the proviso was designed mainly for cases brought by the receiver.

4. The defendants were not charged with violating the federal regulations or the cease and desist order but only with causing Manning to violate them, forming the basis for their breach of duty to Manning.

allegedly illegal under both State and federal law (J.A. 6-9), proof of the federal violation is unnecessary to sustain the claim that defendants breached their duty. Furthermore, the breach of duty could be established without regard to statutory or regulatory violation. The federal law must be an essential element. *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1, 8 (1983); *Shulthis v. McDougal*, 225 U.S. 561, 569 (1912) ("upon the determination of which the result depends").

The conclusory allegation in the complaint that the dividends violated federal law is not supported by the specific allegation therein that Manning violated Sections 4-3 (3093) and 4-20 (3111) of the Illinois Savings and Loan Act in declaring the dividends. These sections do not mention federal regulations or federal law,[5] but petitioner argues that the term "required reserves" in Section 4-20 (3111) includes the FSLIC requirements as well as the requirements of the Illinois Savings and Loan Act (Brief 30). It is thus evident that the controversy in this case does not concern the federal regulations but rather the correct interpretation of the Illinois statute. Even under petitioner's theory there is no federal question or federal controversy in this case. *See Shulthis*, supra, ("really and substantially involve a dispute or controversy respecting the validity, construction or effect of such a (federal) law"). The express allegation in the complaint that this action is based upon defendants' breach of fiduciary duty to Manning as provided in the Illinois Savings and Loan Act is sufficient to bring this case within the proviso. *Gully v. First National Bank*, 299 U.S. 109, 116 (1936) ("By unimpeachable authority, a suit brought upon a state statute does not arise under an act of Congress or the Constitution of the United States because prohibited thereby.")

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5. Section 4-3 (3093) in pertinent part stated that permanent reserve shares are entitled to dividends only as provided in the section concerning dividends.

Section 4-20 (3111) (Dividends) provided in pertinent part as follows: (b)(1) "No dividends shall be declared when the total amount of the contingent reserve is less than that required by the section of this Act concerning Reserves, unless the allocation provided by said section has been made.

Paragraph (b)(4) of said section provided in pertinent part: "No dividends shall be declared on permanent reserve shares until after payment or provision has been made for all expenses, losses, required reserves, and dividends on withdrawable capital; . . .".

Section 4-19 (Reserves) provided for a contingent reserve and such additional optional reserves as may be deemed advisable by the board of directors, including an insurance reserve. *It contained no reference to the net worth and reserve requirements of FSLIC.*

The foregoing sections were part of the Illinois Savings and Loan Act of 1955 which was repealed in 1985, at which time a new Act was passed.

III. PETITIONER'S STATE-BASED CLAIMS ARE PRECLUDED BY THE ABSOLUTE BAR OF THE PROVISO IN SECTION 1730(k)(1), WHICH CANNOT BE CIRCUMVENTED BY RESORT TO THE GENERAL GRANT OF JURISDICTION IN 28 U.S.C. 1345.

As held by the court below and by the Fifth Circuit in *FDIC v. Sumner Financial Corporation*, 602 F.2d 670 (5th Cir. 1979), the proviso for FSLIC and the similar proviso for FDIC, respectively, create an absolute bar to federal jurisdiction for cases covered thereby. The legislative history of the Financial Institutions Supervisory Act of 1966 indicated a Congressional desire to

create "a unified, integrated, self-contained whole . . . setting out a complete scheme for federal jurisdiction over cases in which F.D.I.C. is a party." (*Sumner*, p. 677-8). The same policy governed FSLIC. 1966 U.S. Code Cong. & Admin. News, p. 3538-39, showing Congressional intent to preserve the State and Federal banking and savings and loan systems and not diminish States' authority over State institutions. The court below followed the *Sumner* ruling that agency jurisdiction cannot be resorted to to circumvent the bar of the proviso.

Petitioner's argument (Brief 34-35) that the term "shall not be deemed to arise under" refers only to Section 1331 but not 1345 is addressed by *Sumner* (at 678), which explains that that term was used in the proviso because it was used in the prior grant of jurisdiction in the same section. Furthermore, if the intent was as petitioner argues, the additional words, "within the meaning of section 1331" would have been added, just as an analogous phrase was used in part A.

The Senate report to the bill which introduced the FDIC proviso[6] indicates that it was not referring just to federal question jurisdiction. The Report explained that the section gave jurisdiction "*to courts* having jurisdiction of suits arising under the laws of the United States." This is a clear statement that the "arise under" term was used to describe the court which was given jurisdiction, i.e. the district court, rather than the type of jurisdiction conferred.

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6. Senate Report 1007 to the Banking Act of 1935, quoted in Petitioner's Brief, p. 25 n.22.

Contrary to petitioner's argument, part A of Section 1730(k)(1) was not intended to confer agency jurisdiction but merely to *clarify* what had been certified as a disputed question of law in *Acron Investments, Inc. v. FSLIC*, 363 F.2d 236 (9th Cir. 1966).[7]

Petitioner has advanced arguments which require different jurisdictional results for FSLIC and FDIC. All such arguments must be rejected as contrary to the Congressional plan for uniform jurisdiction for the two agencies and the expressed Congressional interest in preserving the States' authority over state institutions under our dual systems for banks and savings and loan associations. *See* 1966 U.S. Code Cong. & Admin. News, p. 3550, 3538-9.

CONCLUSION

Respondents respectfully urge that the decision of the court of appeals for the Seventh Circuit be affirmed.

Respectfully submitted,

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December 16, 1988

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7. The proposed Act including Section 1730(k)(1) was sent to Congress by the Administration on March 29, 1966 (1966 Code Cong. & Admin. News, p. 3554), at which time *Acron* was still undecided. The Senate Report stated that part A was included to *clarify* that FSLIC was an agency of the United States.